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ECONOMIC WASTES IN TRANSPORTATION

THE vast extent of the United States, the necessity of transporting commodities great distances at low cost and the progressiveness of railway managers has led to an extraordinary development of one phase of rate making. This is the principle of the flat rate, based upon the theory that distance is a quite subordinate if not indeed entirely negligible element in the construction of freight tariffs under circumstances of competition. Albert Fink fully accepted this principle in his classic *Report upon the Adjustment of Railroad Transportation Rates to the Seaboard* almost twenty-five years ago.[1] Mr. J. C. Stubbs, traffic manager of the Harriman lines, speaking of transcontinental business in 1898, clearly expressed it as "the traditional policy of the American lines as between themselves to recognize and to practice equality of rates as the only reasonable and just rule . . . regardless of the characteristics of their respective lines, whether equal in length or widely different . . ."[2]. Professor H. R. Meyer, formerly of the University of Chicago, both in his testimony before the Elkins Committee[3] and in his *Government Regulation of Railway Rates*, is the most prominent academic exponent of this principle. It is the theory upon which the Southern basing-point system is founded; and it is the common practice in making rates into and out of New

[1] P. 41.

[2] Question of Canadian-Pacific Freight Differentials, Hearings, *etc.*, Oct. 12, 1898, p. 118. *Cf.* quotation on p. 391 *infra*.

[3] Vol. ii, pp. 1552 *et seq.*

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England—being in fact vital to the continued prosperity of this out-of-the-way territory. President Tuttle of the Boston & Maine Railroad has most ably supported this principle of equality of rates irrespective of distance. "It is a duty of transportation companies," he says,

> to so adjust their freight tariffs that, regardless of distance, producers and consumers in every part of this country shall, to the fullest extent possible, have equal access to the markets of all parts of this country and of the world, a result wholly impossible of attainment if freight rates must be constructed upon the scientific principle of tons and miles[1] . . .

This is the principle of the blanket rate attacked in the famous Milk Producers' Protective Association case in 1897, and it is the practice which has been so fully discussed of late, as generally applied to lumber rates from the various forest regions of the United States into the treeless tract of the Middle West.[2] The principle, while applied thus generally in the construction of tariffs, is of far greater applicability in the making of special or commodity rates. Under such rates probably three-fourths of the tonnage of American railways is at present moved. The essential principle of such special rates, constitutting exceptions to the classified tariffs, is that of the flat rate; namely, a rate fixed in accordance with what the traffic will bear, without regard to the element of distance.

Such general acceptance, both in practice and theory, of the principle that distance is a relatively unimportant element in rate making is significant at this time, in connection with the recent amendment of the Act to Regulate Commerce. It is important also because of the marked tendency toward the adoption by various state legislatures of the extreme opposite principle of a rigid distance tariff. The old problem of effecting a compromise between these two extreme theories by some form of long and short haul clause—the original section 4 of the act of 1887 having been emasculated by judicial interpretation—is

[1] Int. Com. Com., *In re* Rates on Import and Domestic Traffic, Feb. 28, 1903, p. 7.

[2] Elkins Committee, vol. iii, pp. 2189–91.

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again brought to the front. For these reasons it may be worth while to consider certain results which inevitably follow the widespread acceptance of this principle of the blanket rate. Its benefits are indeed certain; namely, an enlargement of the field of competition, and an equalization of prices over large areas, and that too at the level of the lowest or most efficient production. But these advantages entail certain consequences—of minor importance, perhaps, but none the less deserving of notice.

I

The subordination of distance to other factors in rate making is a logical derivation from the theory of joint cost. This theory justifies the classification of freight; namely, a wide range of rates nicely adjusted to what the traffic in each particular commodity will bear, while always allowing each to contribute something toward fixed and joint expenses. In the same way it explains a close correlation of the distance charge to what each commodity will bear. It assumes that any rate, however low, which will yield a surplus over expenses directly incidental to the increment of traffic and which thus contributes something toward indivisible joint costs, serves not only the carrier by increasing his gross revenue, but at the same time lightens the burden of fixed expenses upon the balance of the traffic. This principle of joint cost, so clearly set forth by Professor Taussig,[1] is fundamental and comprehensive. It pervades every detail of rate making. But it rests upon two basic assumptions which, while generally valid, are not universally so. In the first place each increment of traffic must be *new* business, not tonnage wrested from another carrier and offset by a loss of other business to that competitor. And secondly, each increment of traffic must be *economically suitable* to the particular carriage in contemplation.

The first of these assumptions fails wherever two carriers mutually invade each other's fields or traffic. Each is accepting business at a virtual loss, all costs including fixed charges on capital being taken into account, in order to secure the in-

[1] *Quarterly Journal of Economics*, vol. v, p. 438.

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crement of business. Each gain is offset by a corresponding loss. It is the familiar case of the rate war. A less familiar aspect of the matter is presented when traffic is disadvantageously carried by two competing roads, each diverting business from its natural course over the other's line. The sum total of traffic is not increased. Each carries only as much as before but transports its quota at an abnormal cost to itself. This may, perhaps, swell gross revenues; but by no process of legerdemain can the two losses in operating cost produce a gain of net revenue to both. And each increase of *unnatural* tonnage, where offset by a loss of natural business, instead of serving to lighten the common fixed charges, becomes a dead weight upon all the remaining traffic. The commonest exemplification of this is found in the circuitous transportation of goods, instances of which will be given later.

The second case in which the principle of joint cost fails to justify charges fixed according to what the traffic will bear may arise in the invasion of two remote markets by one another; or, as it might be more aptly phrased, in the overlapping of two distant markets. A railroad is simultaneously transporting goods of like quality in opposite directions. Chicago is selling standard hardware in New York, while New York is doing the same thing in Chicago. Prices are the same in both markets. Of course if the two grades of hardware are of unequal quality, or if they are like goods produced at different cost, an entirely distinct phase of territorial competition is created. But we are assuming that these are standard goods and that there are no such differences either in quality or efficiency of production. What is the result? Is each increment of business to the railroad a gain to it and to the community? The goods being produced at equal cost in both places, the transportation charge must be deducted from profits. For it is obvious that the selling price cannot be much enhanced. The level of what the traffic will bear is determined not, as usual, by the value of the goods but by other considerations. The traffic will bear relatively little, no matter how high its grade.

The result is that the carrier, in order to secure the tonnage, must accept it at a very low rate, despite the length of the haul.

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This is the familiar case of the special or commodity rate granted to build up business in a distant market. Special rates confessedly form three-fourths of the tonnage of American railways, as has already been said. The assumption is usually made that such traffic is a gain to the railways, justified on the principle of joint cost as already explained. But does it really hold good in our hypothetical case? There is a gain of traffic in both directions, to be sure. But must it not be accepted at so low a rate that it falls perilously near the actual operating cost? It is possible that even here it may add something to the carriers' revenue, and thereby lighten the joint costs in other directions. But how about the community and the shipping producers? Are any more goods sold? Perhaps the widened market may stimulate competition, unless that is already keen enough among local producers in each district by itself. The net result would seem to be merely that the railroads' gain is the shippers' loss. There is no addition to, but merely an exchange of, place values. Both producers are doing business at an abnormal distance under mutually disadvantageous circumstances. It may be said, perhaps, that the situation will soon correct itself. If the freight rates reduce profits, each group of producers will tend to draw back from the distant field. This undoubtedly happens in many cases. But the influence of the railway is antagonistic to such withdrawal. It is the railway's business to widen, not to restrict, the area of markets. "The more they scatter the better it is for the railroads." "Keep everyone in business everywhere." And if necessary to give a fillip to languishing competition, do so by a concession in rates. Is there not danger that with a host of eager freight solicitors in the field, and equally ambitious traffic managers in command, a good thing may be overdone, to the disadvantage of the railway, the shippers and the consuming public?

An objection to this chain of reasoning arises at this point. Why need the public or other shippers be concerned about the railways' policy in this regard? Is not each railway the best judge for itself of the profitableness of long-distance traffic? Will it not roughly assign limits to its own activities in extending business, refusing to make rates lower than the actual inci-

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dental cost of operation? And are not all low long-distance rates, in so far as they contribute something toward joint cost, an aid to the short haul traffic? The answer will in a measure depend upon our choice between two main lines of policy: the one seeking to lower *average* rates, even at the expense of increasing divergence between the intermediate and the long-distance points; the other policy seeking, *not so much lower rates as less discriminatory rates* between near and distant points. In the constant pressure for reduced rates in order to widen markets it is not unnatural that the intermediate points, less competitive probably, should be made to contribute an undue share to the fixed sum of joint costs. The common complaint to-day is not of high rates but of relative inequalities as between places. It is a truism to assert that it matters less to a shipping point what rate it pays than that its rate, however high, should be the same for all competing places. This immediately forces us to consider the consumer. What is the effect upon the general level of prices of the American policy of making an extended market the touchstone of success, irrespective of the danger of wastes arising from overlapping markets? That the result may be a general tax upon production is a conclusion with which we shall have later to do. Such a tax, if it exists, would go far to offset the profit which unduly low freight rates in general have produced. In short, the problem is to consider the possible net cost to the American people of our highly evolved and most efficient transportation system. Our markets are so wide, and our distances so vast, that the problem is a peculiarly American one.

II

Having stated the theory of these economic wastes, we may now proceed to consider them as they arise in practice. Concrete illustration of the effect of disregard of distance naturally falls into two distinct groups. Of these the first concerns the circuitous carriage of goods; the second, their transportation for excessive distances. Both alike involve economic wastes, in some degree perhaps inevitable, but none the less deserving of evaluation. And both practices, even if defensible at times,

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are exposed to constant danger of excess. It will be convenient also to differentiate sharply the all-rail carriage from the combined rail and water transportation. For as between railroads and waterways the difference in cost of service is so uncertain and fluctuating that comparisons on the basis of mere distance have little value.

Recent instances of wasteful and circuitous all-rail transportation are abundant. A few typical ones will suffice to show how common the evil is. President Ramsay of the Wabash has testified as to the round-about competition with the Pennsylvania Railroad between Philadelphia and Pittsburg by which sometimes as much as 57 per cent of traffic between those two points may be diverted from the direct route. "They haul freight 700 miles around sometimes to meet a point in competition 200 miles away."[1] Chicago and New Orleans are 912 miles apart, and about equally distant—2500 miles—from San Francisco. The traffic manager of the Illinois Central states that that company "engages in San Francisco business directly *via* New Orleans from the Chicago territory, and there is a large amount of that business, and we engage in it right along."[2] This case therefore represents a superfluous lateral haul of nearly a thousand miles between two points 2500 miles apart. The Canadian Pacific used to take business for San Francisco, all-rail, from points as far south as Tennessee and Arkansas, diverting it from the direct way *via* Kansas City.[3]

Goods moving in the opposite direction from San Francisco have been hauled to Omaha by way of Winnipeg, journeying around three sides of a rectangle by so doing, in order to save five or six cents per hundred pounds.[4] Between New York and New Orleans nearly one hundred all-rail lines may compete for business. The direct route being 1340 miles, goods may be car-

[1] Senate (Elkins) Committee Report, 1905, vol. iii, pp. 2152–3. The transverse Buffalo, Rochester and Pittsburg seems to be the feeder for the New York Central and the Reading.

[2] *Ibid.* vol. iv, p. 2849.

[3] Question of Canadian-Pacific Differentials, Hearings, *etc.*, Oct. 12, 1898, p. 115. Privately printed. *Cf.* also the Sunset Route, *ibid.* p. 116.

[4] 51st Congress, 1st sess., Sen. Rep. no. 847, p. 176.

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ried 2051 miles *via* Buffalo, New Haven (Ind.), St. Louis and Texarkana.[1] A generation ago conditions were even worse, the various distances by competitive routes between St. Louis and Atlanta ranging from 526 to 1855 miles.[2] New York business for the West was often carried by boat to the mouth of the Connecticut river, and thence by rail over the Central Vermont to a connection with the Grand Trunk for Chicago. To be moved at the outset due north 200 miles from New York on a journey to a point—Montgomery, Ala.—south of southwest seems wasteful; yet the New York Central is in the field for that business.[3] It is nearly as uneconomical as in the old days when freight was carried from Cincinnati to Atlanta *via* the Chesapeake and Ohio, thence down by rail to Augusta and back to destination.[4] Even right in the heart of eastern trunk-line territory, such things occur in recent times. The Cincinnati, Hamilton and Dayton prior to its consolidation with the Père Marquette divided its eastbound tonnage from the rich territory about Cincinnati among the trunk lines naturally tributary. But no sooner was it consolidated with the Michigan road than its eastbound freight was diverted to the north—first hauled to Toledo, Detroit and even up to Port Huron, thence moving east and around Lake Erie to Buffalo.[5] In the Chicago field similar practices occur. Formerly the Northwestern road was charged with making shipments from Chicago to Sioux City *via* St. Paul. This required a carriage of 670 miles between points only 536 miles apart; and the complaint arose that the round-about rate was cheaper than the rate by the direct routes. I am privately informed that the Wisconsin Central at present makes rates between these same points in conjunction with the Great Northern, the excess distance over the direct route being 283 miles. Complaints before the Elkins Committee[7] are not

[1] *Pubs. Amer. Stat. Ass.*, June, 1896, p. 73.

[2] Reports Internal Commerce, 1876, pp. 54–9.

[3] Map in Brief of Ed. Baxter, U. S. Supreme Court in the Alabama Midland case.

[4] Windom Committee, vol. ii, p. 795.

[5] New York *Evening Post*, Sept. 30, 1905.

[6] 51st Cong., 1st sess., Sen. Rep. 847, p. 637.

[7] Elkins Committee, vol. iii, p. 1831.

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widely different in character. Thus it appears that traffic is hauled from Chicago to Des Moines by way of Fort Dodge at lower rates than it is carried direct by the Rock Island road, despite the fact that Fort Dodge is 80 miles north and a little west of Des Moines. The Illinois Central, having no line to Des Moines, pro-rates with the Minneapolis and St. Louis, the two forming two sides of a triangular haul. An interesting suggestion of the volume of this indirect routing is afforded by the statistics of merchandise shipped between American points which passes through Canada in bond.[1] The evidence of economic waste is conclusive.

A common form of wastefulness in transportation arises when freight from a point intermediate between two termini is hauled to either one by way of the other. Such cases are scattered throughout our railroad history. One of the delegates to the Illinois Constitutional Convention of 1870 cites, as an instance of local discrimination, the fact that lumber from Chicago to Springfield, Ill., could be shipped more cheaply by way of St. Louis than by the direct route.[2] And now a generation later, it appears that grain from Cannon Falls, 49 miles south of St. Paul on the direct line to Chicago, destined for Louisville, Ky., can be hauled up to St. Paul on local rates and thence on a through billing to destination, back over the same rails, considerably

[1] Only once compiled in detail. U. S. Treasury Dept., Circular no. 37, 1898. The volume of traffic by tons between points in designated states by way of Canada was as follows:

From Illinois to California	11,800
From Illinois to New Jersey	80,000
From Illinois to Pennsylvania	123,000
From Kentucky to Pennsylvania	1,005
From Kentucky to New York	5,516
From Missouri to Pennsylvania	5,000
From Pennsylvania to Missouri	13,824
From New York to Kentucky	3,357
From New York to Missouri	12,869
From New York to Tennessee	609
From Ohio to Pennsylvania	26,801
From Pennsylvania to Ohio	5,251
From Ohio to New York	211,657
From New York to Ohio	55,243

[2] Debates, vol. ii, p. 1646, cited in University of Illinois Studies, Mar., 1904, p. 21.

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cheaper than by sending it as it should properly go.[1] The Hepburn Committee reveals shipments from Rochester, N. Y. to St. Louis, Minneapolis or California, all rail, on a combination of local rates to New York and thence to destination.[2] Presumably the freight was hauled 300 miles due east and then retraced the same distance; as New York freight for southern California is today hauled to San Francisco by the Southern Pacific and then perhaps 300 miles back over the same rails. Even if the rate must be based on a combination of low through rates and higher local rates, it seems a waste of energy to continue the five or six hundred miles extra haul. Yet the practice is common in the entire Western territory. From New York to Salt Lake City by way of San Francisco is another instance in point.[3] Of course a short haul to a terminal to enable through trains to be made up presents an entirely different problem of cost from the abnormal instances above mentioned.[4]

Carriage by water is so much cheaper and as compared with land transportation is subject to such different rate-governing principles, that it deserves separate consideration. Mere distance, as has already been said, being really only one element in the determination of cost, a circuitous water route may in reality be more economical than direct carriage overland. Yet beyond a certain point, regard being paid to the relative cost per mile of the two modes of transport, water-borne traffic may entail economic wastes not incomparable to those arising in land transportation. In international trade, entirely confined to vessel carriage, a few examples will suffice for illustration. Machinery for a stamp mill, it was found, could be shipped from Chicago to San Francisco by way of Shanghai, China, for fifteen cents per hundred weight less than by way of the economically proper route. Were the goods ever really sent

[1] Elkins Committee, vol. i, pp. 32–34. *Cf.* also Cannon Falls Elevator Co. case, decided by the Int. Com. Com., Mar. 25, 1905.

[2] P. 2031.

[3] Elkins Committee, 1905, vol. ii, p. 921.

[4] Cullom Committee, vol. ii, p. 101.

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by so indirect a route?[1] It would appear so when wheat may profitably be carried from San Francisco to Watertown, Mass., after having been taken to Liverpool, stored there, reshipped to Boston, thereafter even paying the charges of a local haul of nearly ten miles;[2] or when shipments from Liverpool to New York may be made *via* Montreal to Chicago, and thence back to destination.[3] I am credibly informed that shipments of the American Tobacco Co. from Louisville, Ky., to Japan used commonly to go *via* Boston. Denver testimony is to the effect that machinery, made in Colorado, shipped to Sydney, Australia, can be transported *via* Chicago for one-half the rate for the direct shipment; and that on similar goods even Kansas City could ship by the carload considerably cheaper by the same round-about route. Conversely straw matting from Yokohama to Denver direct must pay $2.87 per hundred pounds; while if shipped to the Missouri river, 500 miles east of Denver, and then back, the rate is only $2.05.[4]

As a domestic problem, water carriage confined to our own territory has greater significance in the present inquiry. Purely coastwise traffic conditions are peculiar and in the United States, as a rule, concern either the South Atlantic seaports or transcontinental business. As to the first named class, the volume and importance of the traffic is immense. Its character may be indicated by a quotation from a railroad man.

> Now a great deal has been said, chiefly on the outside, about the Canadian Pacific Railway seeking by its long, circuitous and broken route to share in a tonnage as against more direct and shorter lines all-rail, and I propose to show to you gentlemen that not only have we a precedent on which to claim differentials, many of them, and that we also have numerous precedents to show that there are numerous broken, circuitous water-and-rail lines operating all over the country that are longer and more circuitous than ours, and still they do operate with more or less success. . . . In saying this I do not wish to be understood as criticising the right of any road to go anywhere, even with a

[1] Report Int. Com. Com., *In re* Publication and Filing of Tariffs on Export and Import Traffic, decided Feb. 5, 1904, p. 81.

[2] Elkins Committee, vol. ii, p. 919.

[3] *Ibid.*, p. 1624.

[4] Int. Com. Com. case, no. 723, Kindel *vs.* B. & A. R. R., *etc.*, p. 508.

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broken and circuitous line, to seek for business, so long as they are satisfied that taking all the circumstances into account such business will afford them some small measure of profit. . . .

The distance by the Chesapeake & Ohio Road, Boston to Newport News, is 544 miles by water; Newport News to Chicago, 1071 miles, total 1615 miles from Boston to Chicago, against 1020 miles by the shortest all-rail line from Boston, showing the line *via* Newport News, 58 per cent longer. The distance by the Chesapeake and Ohio from New York to Newport News is 305 miles, to which add 1071 miles, Newport News to Chicago, total 1376 miles, against the shortest all-rail line of 912 miles, 50.87 per cent longer. Again the distance between Boston and Duluth by all-rail is 1382 miles, against 2195 miles *via* Newport News and Chicago, 58.82 per cent longer by the broken route.

The Southern Pacific Co., or System rather, in connection with the Morgan line steamers carries business, *via* New York, New Orleans and Fort Worth, to Utah points at a differential rate. The distance from New York to Denver *via* water to New Orleans thence rail to Fort Worth is 3155 miles, against 1940 miles by the direct all-rail line, showing it to be longer *via* New Orleans 62.61 per cent.[1]

Allowing a constructive mileage of one-third for the last named water haul,[2] many of these even up fairly well with the all-rail carriage; although a route from New York to Kansas City by way of Savannah, Georgia, would appear to be an extreme case, owing to the relatively long haul by rail.[3] The increasing importance of Galveston and the necessity of a back haul to compensate for export business make it possible for that city to engage in business between New York and Kansas City, although the roundabout route is two and one-half times as long as the direct one.[4] As compared with these examples, it is no wonder that the competition for New York–Nashville or New England–Chattanooga business by way of Savannah, Mobile or Brunswick, Georgia, is so bitter. The roundabout

[1] Question of Canadian Pacific Freight Differentials, Hearings, *etc.*, Oct. 12, 1898, p. 17. Privately printed. See also pp. 72 and 116 on the same point.

[2] Record Cincinnati Freight Bureau case, vol. ii, p. 306.

[3] Hearings, Question of Can. Pac. Freight Differentials, Oct. 12, 1898, p. 55.

[4] U. S. Industrial Commission, vol. iv, p. 134.

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traffic thus reaches around by the southern ports and nearly up again to the Ohio river.[1]

The second great class of broken rail and water shipments consists of transcontinental business. Goods from New York to San Francisco commonly go by way of New Orleans or Galveston,[2] as well as by Canadian ports and routes.[3] In the opposite direction, goods are carried about 1000 miles by water to Seattle or Vancouver before commencing the journey east. But more important, as illustrating this point, is the traffic from the Central West which reaches the Pacific coast by way of Atlantic seaports. As far west as the Missouri, the actual competition of the trunk lines on California business has since 1894[4] brought about the condition of the "blanket" or "postage stamp" rate. The same competitive conditions which open up Denver or Kansas City to New York shippers by way of New Orleans or Galveston enable the Southern Pacific railroad or Cape Horn routes to solicit California shipments in Western territory to be hauled back to New York, and thence by water all or part of the way to destination. How important this potential competition is—that is to say, what proportion of the traffic is interchanged by this route—cannot readily be determined.

Transportation over undue distances—the carriage of coals to Newcastle in exchange for cotton piece goods hauled to Lancashire—as a product of keen commercial competition may involve both a waste of energy and an enhancement of prices in a manner seldom appreciated. The transportation of goods great distances at low rates, while economically justifiable in opening up new channels of business, becomes wasteful the moment such carriage, instead of creating new business, merely

[1] 55th Cong., 1st sess., Sen. Doc. no. 39, p. 88.

[2] By water from New York, 1800 miles to New Orleans, with 2489 miles by rail. Or to Galveston 2300 miles, with 2666 miles by rail, a total of 4966 miles. The direct line, all rail, is about 3300 miles. Allowing constructive mileage of 3 to 1 for water carriage, they are far from equal.

[3] Texas cotton bound for Yokohama by way of Seattle.

[4] On these matters the Record of the Business Men's League of St. Louis case before the Interstate Commerce Commission; and the Hearings on Canadian Pacific Differentials are illuminating.

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brings about an exchange between widely separated markets, or an invasion of fields naturally tributary to other centres. The wider the market, the greater is the chance of the most efficient production at the lowest cost. The analogy at this point to the problem of protective tariff legislation is obvious. For a country to dispose of its surplus products abroad by cutting prices may not involve economic loss; but for two countries to be simultaneously engaged in "dumping" their products into each other's markets is quite a different matter. In transportation such cases arise whenever a community, producing a surplus of a given commodity, supplies itself, nevertheless, with that same commodity from a distant market. It may not be a just grievance that Iowa, a great cattle raising state, should be forced to procure her dressed meats in Chicago or Omaha;[1] for in this case some degree of manufacture has ensued in these highly specialized centres. But the practice is less defensible where the identical product is redistributed after long carriage to and from a distant point. Arkansas is a great fruit raising region; yet so cheap is transportation that dried fruits, perhaps of its own growing, are distributed by wholesale grocers in Chicago throughout its territory. The privilege of selling rice in the rice-growing states from Chicago is, however, denied by the Southern Railway Association.[2] An illuminating example of similar character occurs in the Southern cotton manufacture, as described by a Chicago jobber.

> Right in North Carolina there is one mill shipping 60 carloads of goods to Chicago in a season, and a great many of these same goods are brought right back to this very section. . . . I might add that when many of these heavy cotton goods made in this southeastern section are shipped both to New York and Chicago and then sold and reshipped South, they pay 15 cents to 20 cents per hundred less each way to New York and back than *via* Chicago. This doubles up the handicap against which Chicago is obliged to contend and renders the unfairness still more burdensome.[3]

[1] Elkins Committee, vol. iii, p. 1830.

[2] Record before the I. C. C.; Cincinnati Freight Bureau case, vol. i, p. 166.

[3] Elkins Committee, vol. iii, pp. 2540–41.

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Not essentially different is a case recently brought before the Interstate Commerce Commission, outlined to me by the chairman, Hon. Martin A. Knapp. A sash and blind manufacturer in Detroit was seeking to extend his market in New England. At the same time it appeared that other manufacturers of the same goods located in Vermont were marketing their product in Michigan. The burden of the complaint of the Detroit producer was not directed to this invasion of his home territory; but rather to the fact that the freight rate from Boston to Detroit, probably due to back loading, was only about one-half the rate imposed upon goods in the opposite direction, from Detroit to the seaboard. Is not this an anomalous situation? Two producers presumably of equal efficiency in production are each invading the territory naturally tributary to the other and are enabled to do so by reason of the railway policy of "keeping everyone in business" everywhere, regardless of distance. President Tuttle of the Boston and Maine Railroad is perhaps the most outspoken exponent of this policy, it being in a sense a necessity imposed upon New England by reason of its remoteness to stimulate the long-haul business.

Generally the roads have never refused to help in the stimulation of industries everywhere. They all participate. I have even known it to happen between New York and Boston that a freight train would have a carload of bananas going in one direction and would pass a train having a carload of bananas going in the opposite direction, so that a carload of bananas are landed in New York and in the Boston market on the same day. I do not know how it is done, but it is done. . . . I should be just as much interested in the stimulating of Chicago manufacturers, in sending their products into New England to sell, as I would be in sending those from New England into Chicago to sell. It is the business of the railroads centering in Chicago to send the products from Chicago in every direction. It is our particular business in New England to send the New England products all over the country. The more they scatter the better it is for the railroads. The railroad does not discriminate against shipments because they are eastbound or westbound. We are glad to see the same things come from Chicago into New England that are manufactured and sent from New England into Chicago.[1]

[1] Elkins Committee, vol. ii, p. 981.

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This is of course what naturally results. The overweening desire of the large centres to enter every market is well exemplified in the Elkins Committee Hearings by testimony of the Chicago jobbers.[1]

A few years later, when the railroads established the relative rates of freight between New York and Philadelphia and the Southeast, and St. Louis, Cincinnati and Chicago and the Southeast, giving the former the sales of merchandise and the latter the furnishing of food products, the hardware consumed in this country was manufactured in England. At that time we, in Chicago, felt that we were going beyond the confines of our legitimate territory when we diffidently asked the merchants in western Indiana to buy their goods in our market. Today, a very considerable percentage of the hardware used in the United States is manufactured in the Middle West, and we are profitably selling general hardware through a corps of traveling salesmen in New York, Pennsylvania and West Virginia, and special lines in New England.

What we claim is that we should not have our territory stopped at the Ohio river by any act of yours. It is not stopped, gentlemen, by any other river in America. It is not stopped by the greatest river, the Mississippi. It is not stopped by the far greater river, the Missouri. It is not stopped by the Arkansas; it is not stopped by the Rio Grande. It is not stopped even by the Columbia; and, even in the grocery business, it is not stopped by the Hudson. There are Chicago houses that are selling goods in New York city, groceries that they manufacture themselves. Mr. Sprague's own house sells goods in New York city, and Chicago is selling groceries in New England. As I say, even the Hudson river doesn't stop them.

All this record implies progressiveness, energy and ambition, on the part of both business men and traffic officers. Nothing is more remarkable in American commerce than its freedom from restraints. Elasticity and quick adaptation to the exigencies of business are peculiarities of American railroad operation. This is due to the progressiveness of our railway managers in seeking constantly to develop new territory and build up business. The strongest contrast between Europe and the United States lies in this fact. European railroads take business as they find it. Our railroads make it. Far be it from me to

[1] Elkins Committee, vol. iii, pp. 2538 and 2550.

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minimize the service rendered in American progress. And yet there are reasonable limits to all good things. We ought to reckon the price which must be paid for this freedom of trade.

III

The causes of economic waste in transportation are various. Not less than six may be distinguished. These are: (1) congestion of the direct route; (2) rate cutting by the weak circuitous line; (3) pro-rating practices in division of joint through rates; (4) desire for back-loading of empty cars; (5) strategic considerations concerning interchange of traffic with connections; and (6) attempts to secure or hold shippers in contested markets. These merit consideration separately in some detail.

Congestion of traffic upon the direct line is a rare condition in our American experience. Few of our railways are overcrowded with business. Their equipment may be overtaxed, but their rails are seldom worked to the utmost. Yet the phenomenal development of trunk-line business since 1897 sometimes makes delivery so slow and uncertain that shippers prefer to patronize railways less advantageously located, even at the same rates. The congestion on the main stem of the Pennsylvania railway between Pittsburg and Philadelphia is a case in point.

Special rates or rebates often divert traffic. The weak lines (in that particular business) are persistently in the field and can secure tonnage only by means of concessions from what may be called the standard or normal rate. The differential rate is an outgrowth of this condition. The present controversy over the right of the initial line in transcontinental business to route the freight at will involves such practices. The carriers insist that they can stop the evil only by the exercise of choice in their connections. An interesting recent example is found in the Elkins Committee testimony. It appears that lumber from points in Mississippi destined for Cleveland instead of going by the proper Ohio river gateways was diverted to East St. Louis. The operation was concealed by billing it to obscure points—Jewett, Ill., near East St. Louis, and Rochester, O.,—and there issuing a new bill of lading to destination.

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Senator Dolliver. And these people carry it up to this little station near St. Louis and then transfer it to another station near Cleveland?

Mr. Robinson. Oh, no; to any point on the Central Traffic Association territory. In other words, it may go to Cleveland.

Senator Dolliver. Why do they bill it to Rochester?

Mr. Robinson. In order to get the benefit of keeping it in transit fifteen days without any extra cost, first.

Senator Dolliver. I do not see how that would affect the question of billing it to Rochester.

Mr. Robinson. Because that enables the wholesaler to have fifteen days extra time in which to sell the lumber.

The Chairman. Why haul it all around the country and then reduce the rate on that long haul?

Mr. Robinson. In order that roads that are not entitled naturally to this traffic may by this process get the traffic.

Senator Dolliver. What roads from Mississippi to East St. Louis?

Mr. Robinson. Any of the trunk lines—the Illinois Central, the Louisville or the Southern Railway lines. The roads in Mississippi south of the river are not parties to this arrangement, you understand. In fact, as fast as they find it out they break it up, or try to. They do not want their traffic diverted.

Senator Kean. Does it not come down to this, that some road is trying to cheat another on the use of its cars?

Mr. Robinson. Not only that, but it is trying to get traffic that does not belong to it.[1]

Wherever a large volume of traffic is moving by an unnatural route, the first explanation which arises therefore is that rebates or rate-cutting are taking place.[2]

A third cause of diversion of traffic is akin to the second; and concerns the practices in pro-rating. Much circuitous transportation is due to the existence of independent transverse lines of railway which may participate in the traffic only on condition that it move by an indirect route. This situation is best described by reference to the following diagram: Let us suppose traffic to be moving by two routes passing through points B and C, and converging on A, which last named point

[1] Testimony, vol. iii, pp. 2495 *et seq.*

[2] The Report of the U. S. Commissioner of Corporations on the Transportation of Petroleum, 1906, affords superb examples. *Viae*, pp. 5, 7, 14 and the map at p. 256.

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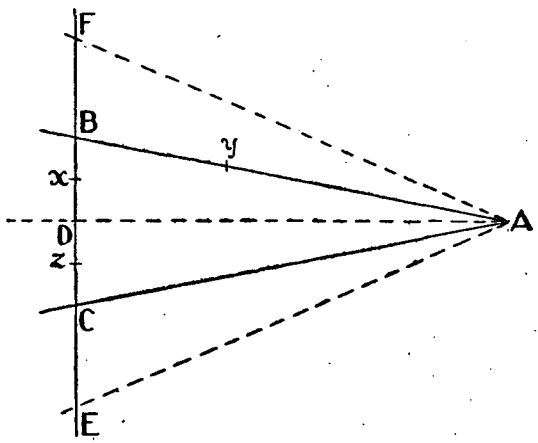
might be Chicago, St. Louis, New York or any other railroad centre. Cutting these two converging lines of railway, we will suppose a transverse line passing through B and C. Obviously the proper function of this railway is as a feeder for the through lines, each being entitled to traffic up to the half-way point, D. But over and above serving as a mere branch, this road, desirous of extending its business, has a powerful incentive to extend operations. The longer the transverse haul, the greater becomes its pro-rating division of the through rate with the main line. Traffic from C is of no profit to the transverse road so long as it is hauled directly to A. But if hauled from C to the



same destination by way of B, the profit may be enhanced in two ways. In the first place the pro-rating distance is greater; and secondly, such traffic from C not being *naturally* tributary to the main line B A, but merely a surplus freight to be added to that already in hand, the main line A B is open to temptation to shrink its usual proportion of the through rate in order to secure the extra business. This same motive may on proper solicitation induce the other main line C A to accept traffic from B and its vicinity. The result is a greatly enhanced profit to the cross line and circuitous carriage of the goods in both directions around two sides of a triangle. Only recently in a case in Texas the Interstate Commerce Commission found

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that two roads thus converging on a common point were each losing to the other traffic which rightfully was tributary to its own line. Our illustrative example is not a fanciful one in any degree.

This roundabout carriage becomes of course increasingly wasteful in proportion to the width of angle between the main lines converging on the common point. And several cases indicate that in extreme instances the two main lines may converge on a common point from exactly opposite directions, while the transverse or secondary road or series of roads forms a wide and roundabout detour. The well known Pittsburg-Youngstown case, cited in the original Louisville and Nashville decision in 1887, serves as illustration. The Pennsylvania was competing from Pittsburg directly east bound to New York with certain feeders of the New York Central lines which took out traffic bound for the same destination but leaving Pittsburg *west bound*.[1] Other instances of the same phenomenon occur at Chattanooga, where freight for New York may leave either northward or southward, at Kansas City and in fact at almost any important inland center.

Another extreme form may even arise in the competition between two parallel trunk lines cut transversely by two independent cross roads. One of these latter may induce traffic to desert the direct route, to cut across to the other trunk line, to move over that some distance and then to be hauled back again to a point on the first main line where it may find a "cut" rate to destination. Grain sometimes used literally to meander to the seaboard in the days of active competition between the trunk lines. Wheat from Iowa and northern Illinois finally reached Portland, Me., by way of Cincinnati in this manner, with a superfluous carriage of from 250 to 350 miles.

Starting within 90 miles of Chicago, though billed due northeast to Portland, wheat has traveled first 97 miles due southwest to avail of the connection of the Baltimore and Ohio railroad for Cincinnati, and thence north to Detroit Junction, a total of 716 miles to reach the latter point and save 5 cents in freight. The direct haul through

[1] I. C. C. Rep., vol. i, p. 32; and Industrial Commission, vol. xix, p. 442.

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Chicago would have been 340 miles less, or a total of 376 miles only.[1]

Another witness describes the route as follows:

Property billed for Portland, Me., started 90 miles below Chicago, although Chicago is on a direct line, and took a southeasterly course, then to Springfield, from Springfield to Flora, then to Cincinnati, and then over the Hamilton and Dayton system to Detroit, there to take the Grand Trunk road to Portland. This was owing to the billing system adhered to here with great tenacity. Property ran around three sides of a square, and I lost money on some of that property.[2]

This ruinous diversion of freight seems to have been dependent upon the existence of active competition at Detroit and ceased when the Grand Trunk came to an agreement with the American lines. But there can be no doubt that wherever these cross lines exist there is a strong tendency toward diversion. In the recent hearings of the Senate Committee on Interstate Commerce on railway rate regulation, a railroad witness again describes the operation:

Mr. Vining. Well, for instance, take the time when I was on the Grand Rapids and Indiana Railroad. Its connection at the south was at Fort Wayne, with the Pittsburg, Fort Wayne and Chicago road. We took lumber out of Michigan and wanted to send it east. We had to compete with lines that went by way of Detroit, that went perhaps through Canada and that in some cases were shorter. Of course, if we wanted to send lumber from Grand Rapids to New York we had to make at least as low a rate as was made by other lines leading from Grand Rapids to New York. That rate might be just the same from Fort Wayne as from Grand Rapids, so that we could not get any more than the low rate from Fort Wayne. We had to go in that case to the Pittsburg, Fort Wayne and Chicago Railway and say: "Here are so many carloads of lumber, or so much lumber, at Grand Rapids, a part of which could be shipped to New York if we had through rates that would enable us to move it. These other lines are carrying it for

[1] Statements taken before the Com. on Interstate Commerce of the U. S. Senate with respect to the Transportation Interests of the U. S. and Canada. Washington, 1890, p. 616.

[2] *Ibid.*, p. 631.

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25 cents a hundred pounds to New York. You join us in a through rate of 25 cents and we can give you some of that business." . . . But if I were with a short line and wanted to negotiate with a long one, I should try to put my case just as strongly as possible before the long line. I should say to them: "We can not take 5 per cent of a rate of 25 cents. It would not pay us. You know that; you can see that;" and they, as business men, would admit it. "Well," I would say, "give us 5 cents a hundred pounds and we will bring the business to you, and if you do not, we can not afford to do it."

Senator Cullom. I think in some instances they have stated before us that they gave 25 per cent.

Mr. Vining. They might.[1]

Whenever the cross road was financially embarrassed, the tendency to diversion was increased. For then, of course, having repudiated fixed charges, the cross line could accept almost any rate as better than the loss of the traffic. And that this was in the past almost a chronic condition in Western trunk line territory appears from the fact that eighteen out of the twenty-two roads cutting the Illinois Central between Chicago and Cairo have been in the hands of receivers since 1874.[2]

It not infrequently happens that the initial railroad may entirely control a roundabout route, whereas shipments by the most direct line necessitate a division of the joint rate with other companies. In such a case the initial line will naturally favor the indirect route, at the risk of economic loss to the community and even to its own shippers. An interesting illustration is afforded by a complaint of wheat growers at Ritzville in the state of Washington concerning rates to Portland, Oregon.[3] By direct line with low grades along the Columbia river the distance was 311 miles. This was composed of several independent but connecting links. The Northern Pacific on the other hand had a line of its own, 480 miles long, which moreover crossed two mountain ranges with heavy grades. It based its charges upon the cost of service by this roundabout and expensive line; and insisted upon its right to the traffic

[1] Elkins Committee, ii, p. 1706.

[2] Quoted from Acworth, 55th Cong., 1st sess., Sen. Doc. 39, p. 33.

[3] Newland *v.* Nor. Pac. R. R. Co., I. C. C. Rep., vol. vi, p. 131.

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despite the wishes of the shippers. The Commission upheld the shippers' contention for the right to have their products carried to market in the most efficient manner.[1] Another instance on the Illinois Central is suggestive, concerning shipments from Panola, Illinois, to Peoria, a distance of about forty miles by the shortest line of connecting roads. Yet the Illinois Central having a line of its own *via* Clinton and Lincoln transported goods round three sides of a rectangle, a distance of 109 miles, presumably in order to avoid a pro-rating division of the through rate.[2] Of course elements of operating cost enter sometimes, as in the case of back-loading;[3] but in the main the pro-rating consideration rules.

Rebates may or may not be given in connection with circuitous routing. Sometimes the same result may be obtained when one carrier merely shrinks its proportion of a joint through rate, leaving the total charge to the shipper unaffected. Of course it goes without saying that an implication of improper manipulation of rates does not always follow the diversion of freight from a direct line. The rate may be the same by several competitive routes, shipments going as a reward for energy, persistency or personality of the agent. A recent case, concerning rates on lumber from Sheridan, Ind., to New York illustrates this point.[4] Sheridan is 28 miles north of Indianapolis on the Monon road. Quoting from the decision:

> In the division of joint through rates on percentages based on mileage, the defendant line naturally prefers arrangements with connections giving it the longest haul and largest percentages. Therefore it carries this freight at rates based on a carriage through Indianapolis by a direct line eastward, while in fact it carries it in an opposite direction north and west by a longer route, the reduced ton mileage being accepted to secure the traffic.

[1] *Cf.* the case of the C. H. & D. R. R. on p. 388, *supra*.

[2] Record, Illinois Railroad Commission, concerning Reasonable Maximum Rates, 1905, p. 165.

[3] *Cf.* p. 404, *infra*.

[4] Pratt Lumber Co. *v.* Chicago, Indianapolis and Louisville R. R., decided Jan. 27, 1904.

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The Iowa Central, cutting across the four main lines between Chicago and Omaha, derives a large revenue from such diversion. Coal from Peoria west, instead of moving by the shortest line to Omaha, is hauled across the first three to a connection with the devious Great Western line.[1] The motive is obvious.

A fourth cause of diversion of traffic has to do rather with the operating than the traffic department. An inequality of tonnage in opposite directions may make it expedient to solicit business for the sake of a back load. The Canadian Pacific may engage in San Francisco-Omaha business by way of Winnipeg, because of the scarcity of tonnage east bound. The traffic to and from the Southeastern states is quite uneven in volume. The preponderance of bulky freight is north bound to the New England centers of cotton and other manufacture; while from the Western cities, the greater volume of traffic is south bound, consisting of agricultural staples and food stuffs. To equalize this traffic it may often be desirable to secure the most roundabout business. A disturbing element of this sort in the Southern field has always to be reckoned with. A good illustration elsewhere occurs in the well known St. Cloud case.[2] The Northern Pacific accepted tonnage for a most circuitous haul to Duluth, but seems to have done so largely in order to provide lading for a preponderance of "empties." In this case it did not lower the normal rate but accepted it for a much longer haul.

Not unlike the preceding cause, also, is a fifth, the desire to be in position to interchange traffic on terms of equality with powerful connections. Mr. Bowes, traffic manager of the Illinois Central, justifying the participation of this road in Chicago-San Francisco business by way of New Orleans, well stated it as follows:[3]

> Of course the Southern Pacific Railroad, as you gentlemen know, originate and control a very large traffic, which they can deliver at various junctions; at New Orleans, where they have their long haul to

[1] Boston *Transcript*, Oct. 14, 1905.

[2] Tileston Milling Co. *v.* Nor. Pac., decided Nov. 29, 1899.

[3] Elkins Committee, vol. iv, p. 2850.

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the Missouri River, and we naturally want some of that business, a long-haul traffic to New Orleans, and in giving it to them we place them under obligations to reciprocate and give us some traffic. That is one of the things that occurs to a railroad man as to increasing the volume and value of his traffic for the benefit of his company.

A sixth and final reason for diversion of traffic from the direct line may be partly sentimental, but none the less significant. It concerns the question of competition at abnormal distances. We may cite two railroad witnesses, who aptly describe the situation. "We can haul traffic in competition, and we frequently do, as I stated, at less than cost, or nearly so, in order to hold the traffic and our patrons in certain territory —Kansas City for instance—but we do not like to do it."[1] Or again "The Charleston freight is not legitimately ours. . . . We make on these through rates from Chicago to Charleston for instance scarcely anything. But it is an outpost. We must maintain that or have our territory further invaded."[2]
In other words the circuitous or over-long distance haul is a natural though regrettable outcome of railroad competition.

IV

What are the effects of this American practice of unduly disregarding distance as a factor in transportion? Not less than five deserve separate consideration in some detail. It inordinately swells the volume of ton-mileage; it dilutes the ton-mile revenue; it produces rigidity of industrial conditions; it stimulates centralization both of population and of industry, and it is a tax upon American production.

One cannot fail to be impressed with the phenomenal growth of transportation in the United States, especially in recent years. It appears almost as if its volume increased more nearly as the square of population than in direct proportion to it. Our population from 1889 to 1903 increased slightly less than one-third. The railroad mileage grew in about the same proportion. Yet the freight service of American railroads sur-

[1] President Ramsey of the Wabash; Elkins Committee, vol. iii, p. 1971.

[2] Windom Committee, vol. ii, p. 796.

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passed this rate of growth almost five times over. While population and mileage increased one-third, the railroads in 1903 hauled the equivalent of two and one-half times the total volume of freight traffic handled in 1889. In other words, the ton mileage—representing the number of tons of freight hauled one mile—increased from 68,700,000,000 to 173,200,000,000. Do these figures represent all that they purport to show? Every ton of freight which moves from Chicago to San Francisco over a line one thousand miles too long adds 1000 ton miles to swell a fictitious total. Every car-load of cotton goods hauled up to Chicago to be redistributed thence in the original territory and every ton of groceries or agricultural machinery exchanged between two regions with adequate facilities for production of like standard goods contribute to the same end. How large a proportion of this marvellous growth of ton mileage these economic wastes contribute can never be determined with certainty. That their aggrigate is considerable cannot be questioned.

These practices must considerably dilute the returns per mile for service rendered by American carriers—in even greater degree than they enhance the apparent volume of transportation. Long-distance rates must always represent a low revenue per ton mile, owing to the fixed maximum for all distances determined by what the traffic will bear. Furniture made in North Carolina for California consumption[1] cannot be sold there in competition above a certain price. The greater the distance into which the possible margin of profit is divided, the less per mile must be the revenue left for the carrier. Yet this is not all. Such would be true of simply over-long distance carriage. But to this we must add the fact that some of this long-haul tonnage reaches its remote destination over a roundabout line, which increases the already over-long carriage by from 25 to 75 per cent. It is apparent at once that a still greater dilution of the average returns must follow as a result. From 1873 down to 1900 the long and almost uninterrupted decline of rates is an established fact. Has the volume of this economic waste increased or diminished in proportion to the total traffic through-

[1] Elkins Committee, vol. iii, p. 2008.

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out this period? If it is relatively less to-day, at a time when ton mile rates are actually rising, it would be of interest to know how far such economies offset the real increases of rates which have been made. Rates might conceivably rise a little, or at all events remain constant, coincidently with a fall in ton mile revenue produced through savings of this sort.

The third result of undue disregard of distance is a certain inelasticity of industrial conditions. This may occur in either of two ways. The rise of new industries may be hindered, or a well-merited relative decline of old ones under a process of natural selection may be postponed or averted. The first of these is well set forth in the Elkins Committee hearings.[1]

It is always considered desirable to have a long haul, and the rates on a long haul should be much less, in propartion to distance, than on a short haul. This is a principle of rate-making which has grown up as one of the factors in the evolution of the railroad business in this country, and it has greatly stimulated the movement of freight for long distances, has brought the great manufacturing centers in closer touch with the consumer at a distance and the producer in closer touch with centers of trade. It has been of undoubted benefit to both, though it may oftentimes retard the growth of new industries by a system of rates so preferential as to enable the manufacturer a long instance from the field of production of raw material to ship the raw material to his mills, manufacture it and return the manufactured goods cheaper than the local manufacturer could afford to make it, and thus, while building up the centers of manufacture, have retarded the growth of manufacturing in the centers where the raw material is produced.

The other aspect of industrial rigidity is manifested through the perpetuation of an industry in a district, regardless of the physical disabilities under which it is conducted. Another quotation describes it well.[2]

Senator Carmack. Is it the policy of the roads, wherever they find an industry established, to keep it going by advantages in the way of rates regardless of changes in economic conditions?

Mr. Tuttle. I think in so far as it is possible for them to do so. It has not been possible in all cases. We could not keep iron furnaces running in New England; they are all gone.

[1] Vol. iv, p. 3115. [2] Elkins Committee, vol. ii, p. 976.

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One cannot for a moment doubt the advantages of such a policy as a safeguard against violent dislocating shocks to industry. It may render the transition to new and better conditions more gradual and easier to bear. It has been of inestimable value to New England, as exposed to the competition of newer manufactures in the central West. But on the other hand, it is equally true that in the long run the whole country will fare best when each industry is prosecuted in the most favored location—all conditions of marketing as well as of mere production being considered. If Pittsburg is the natural center for iron and steel production, it may not be an unmixed advantage to the country at large, however great its value to New England, to have the carriers perpetuate the barbed wire manufacture at Worcester.[1] Each particular case would have to be decided on its merits. My purpose at present is not to pass judgment on any of them but merely to call attention to the effect of such practices upon the process of industrial selection.

Centralization, or concentration of population, industry and wealth is characteristic of all progressive peoples at the present time. Great economic advantages, through division of labor and cheapened production have resulted; but on the other hand, manifold evils have followed in its train. The results are too well known to need mention in this place. From the preceding paragraph it would appear that American railroad practices operate in some ways to retard this tendency. But much may be adduced in favor of the opposite view. Many staple industries utilizing the raw material at their doors might supply the needs of their several local constituencies were it not that their rise is prevented by low long-distance rates from remote but larger centers of production. Denver, in striving to establish paper mills to utilize its own Colorado wood pulp, is threatened by the low rates from Wisconsin centers. Each locality ambitious to become self-supporting is hindered by the persistency of competition from far away cities. This is particularly true of distributive business. The overweening ambition of the great cities to monopolize the jobbing trade, regardless of distance,

[1] Specifically described in Elkins Committee, vol. ii, p. 923.

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has already been discussed.[1] And it follows of course that the larger the city, the more forcibly may it press its demands upon the carriers for low rates to the most remote hamlets. The files of the Interstate Commerce Commission are stocked with examples of this kind. The plea of the smaller cities and the agricultural states—Iowa for example—for a right to a share in the distributive trade naturally tributary to them by reason of their location formed no inconsiderable element in the recent popular demand for legislation by the Federal government.

In the fifth place, every waste in transportation service is in the long run a tax upon the productivity of the country. More men may be employed, more wages paid, more capital kept in circulation; but it still remains true that the coal consumed, the extra wages paid and the rolling stock used up in the carriage of goods either unduly far or by unreasonably roundabout routes constitute an economic loss to the community. In many cases of course it may be an inevitable offset for other advantages. In the Savannah Freight Bureau Case[2] the facts showed Valdosta, Ga., to be 158 miles from Savannah, while it was 275 and 413 miles by the shortest and longest lines respectively from Charleston. Valdosta's main resource for fertilizer supplies, other things being equal, would naturally be Savannah, the nearer city. Yet in the year in question it appeared that nine-tenths of the supply was actually drawn from Charleston; and much of it was hauled 413 instead of a possible 158 miles. No wonder the complainants alleged "that somebody in the end must pay for that species of foolishness." Whenever the Colorado Fuel and Iron Co. succeeds in selling goods of no better grade or cheaper price in territory naturally tributary to Pittsburg, a tax is laid upon the public to that degree.[3] When Chicago and New York jobbers each strive to invade the other's field, the extra revenue to the carriers may be considerable; but it is the people who ultimately pay the freight. The analogy to the bargain counter is obvious. The public are buying some-

[1] See p. 396, *supra*.

[2] Decided Dec. 31, 1897. I. C. R.

[3] "Practically it may be declared that the public, considered as distinct from railway owners, must pay for all the transportation which it receives" . . . H. T. Newcomb in *Pubs. Am. Stat. Ass.*, N. S. Nr. 34, p. 71.

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thing not necessary for less than cost; while the carriers are selling it for more than it is worth. Economies would redound to the advantage of all parties concerned.

V

What remedy is possible for these economic wastes? Both the carriers and the public have an interest in their abatement. The more efficient industrial combinations have taken the matter in hand, either by strategic location of plants or, as in the case of the United States Steel Corporation, by the utilization of a Pittsburg base price scheme, with freight rates added.[1] But probably the larger proportion of tonnage is still shipped by independent and competing producers. To this traffic the railways must apply their own remedies. Either one of two plans might be of service. The right to make valid agreements for a division either of traffic or territory, if conceded to the carriers by law under proper governmental supervision, would be an effective safeguard. This would mean the repeal of the present prohibition of pooling. Or a reënactment of the Long and Short Haul clause, now emasculated by judicial interpretation, would do much toward accomplishing the same result.

Agreements between carriers previous to 1887 were often employed to obviate unnecessary waste in transportation. The division of territory between the eastern and western lines into the Southern states is a case in point. Thirty years ago competition for trade throughout the South was very keen between the great cities in the East and in the Middle West. Direct lines to the Northwest from Atlanta and Nashville opened up a new avenue of communication with ambitious cities like Chicago, St. Louis and Cincinnati. The state of Georgia constructed the Western and Atlantic railroad in 1851 for the express purpose of developing this trade. As Western manufactures developed, a keen rivalry between the routes respectively east and west of the Alleghany Mountains into the South was engendered. A profitable trade in food products by a natural, direct route from the Ohio gateways was, however, jeopardized by ruinous rates made

[1] Agreements for a scale of cross freights by wholesalers' or jobbers' associations as in Ohio for groceries or hardware are equally effective.

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by the warring trunk lines to the northern seaboard. Corn, oats, wheat and pork came down the coast and into the South through the back door, so to speak, by way of Savannah and other seaports. On the other hand the eastern lines into the South were injuriously affected by the retaliatory rates on manufactured goods made by the western lines for shipments from New York and New England. Freight from each direction was being hauled round three sides of a rectangle. Finally in 1878 a reasonable remedy was found in a division of the field and an agreement to stop all absurdly circuitous long hauls into one another's natural territory. A line was drawn through the Northern states from Buffalo to Pittsburg and Wheeling; through the South from Chattanooga by Montgomery, Ala., to Pensacola. Eastern lines were to accept goods for shipment only from their side of this line to points of destination in the South also on the eastern side of the boundary. Western competitors were to do the same. The result was the recognition of natural rights of each to its territory. This agreement has now formed the basis of railway tariffs into the Southern states for almost a generation. Similar agreements, on a less extensive scale, are commonly used to great advantage. Thus in the "common point" territory formerly tributary to Wilmington, Savannah and Charleston, the first named city insisted upon its right to an equal rate with the other two, no matter how great the disparity of distance. The Southern Railway and Steamship Association arbitrated the matter, fixing a line beyond which Wilmington was to be excluded.[1] Obviously such agreements have no force in law at the present time. The only way to give effect to them is for connecting carriers to refuse to make a joint through rate. This effectually bars the traffic. Moreover entire unanimity of action is essential. Every road must be a party to the compact. Otherwise the traffic will reach its destination by shrunken rates and a more circuitous carriage even than before.

One cannot fail to be impressed in Austria and Germany with the economic advantages of an entirely unified system of operation. No devious routing is permitted. Certain lines are des-

[1] Savannah Freight Bureau case, decided Dec. 31, 1897, pp. 10 and 18.

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ignated for the heavy through traffic, and concentration on them is effected to the exclusion of all others. Between Berlin and Bremen, for example, practically all through traffic is routed by three direct lines. No roundabout circuits occur because of the complete absence of railway competition. No independent lines have to be placated. The sole problem is to cause the tonnage to be most directly and economically transported. And this end is constantly considered in all pooling or through-traffic arrangements with the railway systems independently operated. The Prussian pooling agreements with the Bavarian railways are typical. Each party to the contract originally bound itself not to route freight over any line exceeding the shortest direct one in distance by more than twenty per cent. Compare this with some of our American examples of surplus haulage of fifty or sixty per cent! And within the last year, the renewal of these interstate governmental railway pools in Germany has provided for a reduction of excessive haulage to 10 per cent. The problem of economical operation in Austria-Hungary with its mixed governmental and private railways is more difficult. But no arrangements are permitted which result in such wastes as we have instanced under circumstances of unlimited competition in the United States.

A more consistent enforcement of the long and short haul principle might provide a remedy almost as effective as pooling. The Alabama Midland decision nullified a salutary provision of the law of 1887 by holding that railway competition at the more distant point might create such dissimilarity of circumstances as to justify a higher rate to intermediate stations. Turn to our diagram on page 399 and observe the effect. Traffic around two sides of a triangle from A to C by way of B is carried at a rate equal to the charge for the direct haul from A to C; or it may be even at a lower differential rate. Complaint arises from the intermediate points y and x of relatively unreasonable charges. The roundabout route replies with the usual argument about a small contribution toward fixed charges from the long haul tonnage, which lessens the burden upon the intermediate rate. This is cogent enough up to a certain point. It might justify a lower rate to D, on the natural

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division line of territory. It might be defensible on principle to accord D a lower rate than x or possibly even than y. To deny the validity of lower rates to z or C would however at once follow from the same premises.

Suppose a long and short haul clause to be reënacted, exemption from its provisions to be granted only by the Interstate Commerce Commission, what would be the result? This body roughly determining the location of D, a natural division point, would then refuse to permit A B, B C to charge less to either z or C than to any intermediate point x B or y. Coincidently it would bar the other road A C, C B from any lower through rate to points beyond D, such as x, B or y than to any intermediate station. Two courses would be open to the roads. They must either mutually withdraw from all business beyond D or reduce their rates to all intermediate points correspondingly. In a sparsely settled region with little local business, they might conceivably choose the latter expedient. But in the vast majority of cases the roads would prefer to withdraw from the unreasonably distant fields.[1] Simultaneously taken by each line such action would put an end to the economic waste. At the same time it would terminate one of the most persistent causes of rebates and personal favoritism. To be sure it would generally operate in favor of the strong, direct lines as against the weak and roundabout ones. Great benefit would accrue to the Pennsylvania, the Illinois Central or the Union Pacific railroads. The activities of the parasitic roads and the scope of parasitic operations by the substantial roads would inevitably be curtailed. Much justice would be done and much local irritation and popular discontent would be allayed.

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[1] This problem is involved in the Youngstown-Pittsburg case already mentioned. In the original Louisville and Nashville decision the Commission apparently preferred to encourage competition even at the risk of its being roundabout and "illegitimate." But after the railway attorneys expanded the "rare and peculiar" cases to cover all kinds of competition, the Commission apparently regretted its earlier position. *Cf.* Interstate Commerce Commission Reports, vol. i, p. 82, and vol. v, p. 389; and especially the brief of Ed. Baxter, Esq., in the Alabama Midland case, U. S. Supreme Court, Oct. term, 1896, no. 563, p. 118.

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THE EIGHT HOUR AND PREVAILING RATE MOVEMENT IN NEW YORK STATE[1]

I

THE history of the eight hour and prevailing rate movement in New York state extends back almost to the middle of the last century. Its beginnings are obscured in the imperfect records of early labor union activity. The first accounts of labor meetings contain references to shorter hours of labor and the subject reappears over and over again in their later records.

In the early fall of 1867 a convention of the National Labor Union was held in New York city. Delegates were present from ten eastern and central states. They are reported to have devoted their time to discussing questions of wages and of strikes. New York was officially represented in this convention and its delegates took a leading part in the discussions. In 1869 a report records the existence of thirty-nine "protective or trade unions" of considerable strength in New York city, while "only a few years ago" the only unions of importance were the Typographical Union and the unions of bricklayers and plasterers. To emphasize the value of efficient organization the report shows that the plasterers worked forty-eight hours a week at $4.50 a day, while bakers, who were not organized, worked 120 hours a week for $5.00 a week. In 1870 the number of organizations was reported to be 350, many of them in a flourishing condition. Mass meetings were frequently held at Cooper Institute and in other halls to promote organization and to agitate the questions of wages and of hours of labor. These meetings were reported in some of the papers of the period as "large and enthusiastic" and as devoted to agitating for an increase of wages and a shortening of the hours of labor. Other contemporary accounts declare that, while they were

[1] The writer of this article takes pleasure in acknowledging financial assistance received from the Carnegie Institute to aid him in the preparation of this article.

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reported with enthusiasm, they were in fact "regular stated meetings of the organizations," and that the agitation was "more apparent than real." A reporter for one paper refers to instances in his own experience. One was a meeting of shoemakers where the attendance was fourteen, and another was a meeting of horseshoers where half an hour after the time advertised for the opening there were nine men in a hall that would seat fifty. Such experiences may have been exceptional, or the reports may have been exaggerated. But whether we take the word of sypathizers or of critics of these early organizations, it is clear that wages and hours of labor were the principal subjects of discussion.

The New York State Workingmen's Assembly was organized in 1865. From its inception its main object has been to secure legislation favorable to the interests of its members. From the outset a special committee has been maintained whose duty it has been to be present at Albany during the sessions of the legislature, to take charge of all bills in which the organization was interested and to exert such influence as it could to secure the enactment of such bills into law. The Workingmen's Assembly has thus been an important factor in shaping the labor legislation of the state. In the very first of their legislative programs appears the demand for an eight-hour day. Soon was added the demand for payment of wages at the prevailing rate, and these two demands have been repeated in every program since.

The first effort to regulate wages in the state appears as early as 1777. In that year a law was passed styled "An act to regulate wages of mechanics and laborers, the prices of goods and commodities and the charges of inn-holders, within this state, and for other purposes therein mentioned." The circumstances connected with the passage of this act were briefly these. A resolution had been passed by the Congress of the United States in accordance with which a convention of New England and middle states met and resolved to regulate "the whole matter" referred to in the title of the act. It was the desire to carry into effect the resolution of the convention that led to the passage of this law. On the ground that the other states repre-

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sented in the convention did not enact and enforce similar laws, New York repealed its statute at the next legislative session. This law not only determined the rate of wages but also fixed the prices of a long list of staple commodities. This first effort to regulate wages belongs properly to a former period, of which it stands as a relic. It is an American example of the legislation dating from the days of Elizabeth which was still nominally in force in England at the time of the American Revolution.

The present movement really begins with a statute passed in 1867 which regulated the hours of labor in the following terms: "Eight hours of labor, between the rising and setting of the sun, shall be deemed and held to be a legal day's work, in all cases of labor and service by the day, where there is no contract or agreement to the contrary," but "farm or agricultural labor or service by the year, month or week" was exempted. No person, however, was to be "prevented by anything herein contained from working as many hours over time or extra work, as he or she may see fit, the compensation to be agreed upon between the employer and the employee."

In the later sixties the papers record a large number of strikes in different trades for the purpose of securing the enforcement of the eight-hour law. These strikes, according to a reported statement of one of the early officers, were as a rule not successful. In 1868 the Workingmen's Assembly passed a resolution calling for the repeal of the special contract clause of the law. This demand was complied with by the legislature in 1870. The law then read:

> Eight hours shall constitute a legal day's work for all classes of mechanics, workingmen and laborers, excepting those engaged in farm and domestic labor; but overwork for an extra compensation by agreement between employer and employee is hereby permitted. . . . This act shall apply to all mechanics, workingmen and laborers now or hereafter employed by the state or any municipal corporation therein, through its agents or officers, or in the employ of persons contracting with the state or such corporation for performance of public work.

While the law was made more definite so far as the eight-

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hour limit was concerned, it was to be applied only in cases where work was done by or for the state or a municipal corporation. And even here "overwork" by agreement was permitted. The gain in clearness of definition was thus secured at the expense of breadth of application. Yet it was regarded as a substantial gain by the organizations, for it seemed now as though it would be possible to enforce its provisions. Despite all efforts to secure further change the law remained unmodified for twenty-four years. During this time there were, however, repeated calls for amendment in order to provide for enforcement. In 1894 another clause was added in the following terms:

> All such mechanics, workingmen and laborers so employed shall receive not less than the prevailing rate of wages in the respective trades or callings in which such mechanics, workingmen or laborers are employed in said locality. And in all such employment, none but citizens of the United States shall be employed by the state or any municipal corporation thereof, and every contract hereafter made by the state or any municipal corporation for the performance of public work must comply with the requirements of this section.

Five years later an amendment was passed requiring contractors to stipulate in all public contracts that labor shall be performed in accordance with the eight-hour and prevailing rate provision of the law.[1] The particulars of the contract are so fully stated that twelve lines of the original law are expanded in the new law to thirty-seven. It was also made a penal offence to employ laborers except in accordance with the provisions of this law.

The law requiring the payment of wages at the prevailing rate was the final fruit of earlier and more special legislation. In 1888 a bill, known as the Locktenders' bill, was introduced by the representatives of organized labor. It provided for a fixed rate of wages of two dollars a day for the tenders of canal locks. The bill was not passed. After several conferences

[1] Exceptions were made in the following year in cases of "persons regularly employed in state institutions" and of "engineers, electricians and elevator men in the department of public buildings during the annual session of the legislature."

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between the legislators and the labor representatives, the latter decided to urge a bill the provisions of which should be extended so as to include all the employees of the state. This revised bill was pushed more vigorously than the former one. In the annual convention of the Workingmen's Assembly the bill was endorsed by resolution and the legislative committee was instructed to use its influence. At the session of 1889 the bill, known as the "Two Dollar a Day bill," was declared by the labor organizations to be "the principal labor bill before the legislature." Mass meetings were held in several large cities and resolutions endorsing the measure were sent to the committee. The committees of both houses and the governor held largely attended hearings on the bill. As a consequence of the agitation it finally became a law. Two years before this a resolution had been adopted by the labor organizations urging a clause in a law forbidding the employment of laborers other than citizens and requiring the prevailing rate of wages. The part giving preference to citizens was incorporated in the bill just referred to. As passed, it provided that wages for day laborers employed by the state should not be less than two dollars a day and "in all cases where laborers are employed on any public work in this state, preference shall be given to citizens of the state of New York." At the session of the legislature in the following year, the section of the law requiring the two dollar a day wage was repealed, leaving in force only the provision in regard to citizenship. The labor leaders attributed the repeal of the act to the influence of "farmers and corporations." They still persisted in their efforts. Their next move was a resolution calling for the substitution of the "day work system" at the prevailing rate of wages for the private contract system in all public work. This they finally succeeded in securing, after bringing various influences to bear on the members of the legislature. The regulation for the payment of wages was revived in 1894 in a somewhat different form, and since that time the law has remained on the statute books until by the decision of the court it was declared void.

In the codification of the labor law, in 1897, both matters were dealt with in the same section. Eight hours were declared to

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constitute a legal day's work for all classes of employees except farmers and domestic servants, "unless otherwise provided by law." An agreement would be legal for overwork at an increased compensation except upon work by or for the state or a municipal corporation or by contractors or sub-contractors therewith. Each contract must contain the stipulation that no laborer "shall be permitted or required to work more than eight hours in any one calendar day;" and that wages to be paid for such a day's labor upon public work "or upon any material to be used upon or in connection therewith" must be not less than the rate prevailing in the locality. If these stipulations did not appear in a contract, the contract was to be void. No public official was to pay any money for work done under such a contract, and a violation of this clause was a penal offence.

II

This formulation of the law was the result of continued agitation and persistent effort on the part of the labor organizations of the state. The law in its early form was ineffective, as there was no means provided for enforcement and as the generality of its provisions made it practically meaningless. The codification of the law in 1897, with its definite statement of the provisions, presented the issue in such a way that it could no longer be evaded. The labor interests had the contractors at bay. The law carried a penalty and any one could concern himself in seeing that the penalty was enforced. The commissioner of labor reported in 1900 that there were numerous complaints of violation of this provision of the law. The complaints were investigated and many of the cases turned over to the local district attorneys for prosecution. The results of these prosecutions were not uniform. Some led to success, others to failure. Roads were being made, reservoirs built, streets paved, sewers constructed and other public improvements carried to completion, and the eight hour and prevailing rate provision was not complied with. The law was clear enough. It now remained for the courts to pass upon it; not as to its meaning, but as to its constitutionality. The struggle, therefore, was shifted to the courts.

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A case arose involving payment for overwork done between 1892 and 1894 by the drivers of the street cleaning department in New York city. The case was decided under the old law in favor of the workmen. The law permitted overwork for extra compensation by agreement. The overtime in this case had been done by direction of the head of the department. The city's defense was that no express agreement for extra compensation had been made at the time of employment. The drivers claimed that an agreement was implied. The court interpreted the agreement as an implied contract and binding. The Court of Appeals sustained this decision. As a result 797 drivers were awarded back pay amounting to $1,336,000 for extra work over eight hours. In 1899 a case arose under the new law. A laborer anxious for work was employed on the construction of recreation piers in New York city at $2.25 a day. After working for several months at that rate, he was informed that the union rate for his work was $3.50 a day. He brought suit for the difference in wages and for overtime, a total of $170.50, and was awarded the amount with costs. A case in 1900 brought from the court a statement of the intent and purpose of the law as follows:

> The policy of the law is that laborers . . . employed upon public work shall receive the prevailing rate of wages . . . That policy is just as important with respect to men who are employed by a city . . . The intent is to insure . . . the same amount of wages which it has been found necessary to pay to secure the services of other men at the same sort of work . . . in the same locality.

The provision concerning the prevailing rate was the first to come to a final issue before the Court of Appeals. The substance of the decision may be concisely stated as follows. First, the whole contention must be in regard to the validity of the law. If valid, its insertion in a contract is not necessary, since all contracts are assumed to be made subject to the limitations of existing laws. If not valid, its insertion in a contract does not make it valid. Second, a municipal officer directing a local improvement is not an agent of the state, but of the city alone; and the state legislature cannot limit the right of self-govern-

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ment of a city by interfering in its contracts, since this right is protected by constitutional guarantee. Third, public expenditures can be for city purposes only and the legislature cannot require a city to frame its contracts in the interests of individuals or classes. Where that is done, it amounts to depriving a citizen of property without due process of law. The dissenting opinion differed mainly on the question of the relation of the city to the state. It affirmed the right of the state, as a proprietor, to prescribe the conditions of contracts into which its agents may enter; and furthermore asserted that a municipal corporation is, so far as its purely municipal relations are concerned, simply an agent of the state for conducting the affairs of the government.[1] The result of the decision was to anull that part of the law which required payment of wages at the prevailing rate for municipal improvements made for the city by contractors.[2]

These decisions left the eight-hour clause technically undecided. Yet a strong suspicion of its unconstitutionality prevailed. The reason for failure in bringing many contractors to trial was the difficulty in securing a true bill from a grand jury. The theory underlying the two clauses was the same, they insisted, and if one clause was unconstitutional the other must be. Upon request from the grand jury for instructions upon the point the court replied: "That law, I think, when the test comes, will be declared unconstitutional . . . and if such a case comes before you I would advise you to refuse to indict because any indictment here brought would be set aside by this court." Such was the feeling before the matter was brought to final issue, and because of it several indictments were dismissed.

A beginning was made in the contention over the eight-hour clause in an effort to stop the payment of bills due the Munici-

[1] An extended account of this case may be found in the *Bulletin of the Department of Labor*, N. Y., Mar., 1901, pp. 45–61. People *ex rel.* Rodgers *v.* Coler, 166 N. Y., 1.

[2] A previous case (Clarke *v.* State of New York, 142 N. Y., 101) had affirmed the law so far as work done for the state was concerned. In 1904 it was held (Ryan *v.* City of N. Y., 177 N. Y. Rep., 271) that the law was constitutional when applied to workingmen in the direct employment of the city.

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pal Gas Company of Albany for gas used in public buildings, on the ground that the gas was made by workmen who worked more than eight hours. The attorney general gave an opinion to the effect that the law was valid. The company appealed to the courts. The decision of the latter was in favor of the gas company on the ground that the law applied to public work which meant virtually construction work. The supplying of gas and electricity cannot be construed as in any sense a contract involving "labor" on "public work." Gas and electricity, incandescent and carbon lamps, declared the court, are marketable commodities, articles of common merchandise, just as are brick or stone. In 1903 the Court of Appeals held unconstitutional the section of the penal code which affixed a penalty for violating the provision of the labor law.[1] Thus one of the most efficient means for enforcing the law was removed. Yet the attorney general gave it as his opinion that the decision did not affect in any way the validity of the labor law itself. The question finally came before the Court of Appeals and was decided squarely on its merits. The principle of the Rodgers case was applied and the eight-hour section declared unconstitutional. It was thought by many that the law might be upheld; for the personnel of the court had changed since the former decision, and the United States Supreme Court had in the meantime upheld the Kansas eight-hour law. Yet the precedent in the former case was followed. In substance the decision set forth the same principle as in the Rodgers case, declaring that the law and constitution of New York assure the municipality a certain degree of independence and this independence may not be infringed by the legislature. Two justices dissented on the ground that there were important distinctions between the two requirements and that the requirement in question was sound, being a valid exercise of the police power in the interest of the public welfare. As in the Rodgers case, the decision applied only to contractors doing work for municipal corporations.[2] This decision was supported by five of the seven justices. Yet

[1] People *v.* Orange County Road Construction Company, 175 N. Y. Rep., 84.

[2] People *ex rel.* Cossey *v.* Grout.

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they came to the conclusion by different courses of reasoning, some holding that the rights of municipal corporations were invaded; others that the property of the contractor was confiscated.

III

After the change made in 1870, the statute that remained in force applied only to laborers on public work. Yet many trades were desirous of invoking the law to restrict hours of labor. This effort, however, did not take the form of a general movement. Several trades, well organized and anxious for further advantages, engaged in separate endeavors to secure laws favorable to themselves. The several laws secured in this way constitute a considerable portion of the labor law of the state. Among the special trades that have at various times received consideration at the hands of the legislature are plumbers, railway employees, brick makers, stone cutters, bakers, barbers, horseshoers, engineers and drug clerks. As a rule the laws passed have been in the direction of restricting the number of hours of work in these trades, and in some cases provision has been made for licensing the workmen or granting certificates after an examination by a specially constituted board. The bakers' law provided for inspection of bake shops, in addition to limiting the number of hours of work. The laws in some cases were passed only after ten years of most persistent effort. This was true especially in the case of the law applying to railway employees and to stone cutters. Seldom did the laws enacted include all that was desired. The stone cutters' law, for instance, provided that all stone for state or municipal works should be cut within the state and, when possible, on the grounds where the construction work was being done. This law was passed in 1894. In 1898 the New York Central Railroad was engaged in the construction of a depot at Albany. The Workingmen's Federation backed a bill requiring all stone for that building to be cut in Albany, by union labor and at the union schedule of wages and hours. Although pushed with vigor the bill was not passed.

The attitude of the courts toward this line of legislation, as

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indicated by recent decisions, has tended to check the zeal with which the bills have been urged. In 1904 the law pertaining to horseshoers was held to be unconstitutional. As a type of some of the special trade legislation of the state, it may be explained somewhat in detail. The law required that all journeymen or master horseshoers should be examined by a state board. This board consisted of one veterinarian, two master horseshoers and two journeymen horseshoers, all to be citizens of the state and residents of the cities of the state, to be appointed by the governor for a term of five years. A person was qualified to take the examination provided he had served an apprenticeship for at least three years. The board then was empowered, if the candidate passed the examination, to issue a certificate which served as evidence of fitness. This certificate was then to be registered in the office of the clerk of the county in which the applicant intended to ply his trade. A fee of five dollars was to be paid at the time of the application for the examination and a fee of twenty-five cents on filing the certificate in the county clerk's office. This law was annulled by the unanimous vote of the appellate division of the Supreme Court. Two arguments were advanced in favor of the law. One held that the regulation of the trade was properly a matter for state supervision and came within the police power; the other, that the law was in support of the effort to prevent cruelty to animals. The decision did not recognize the validity of either argument.

> It does not seem that this regulation tends to promote the public weal along any of the lines upon which the exercise of the police power in various cases which have arisen has been made to rest. * * * It is difficult indeed to see how the regulation of shoeing horses has any tendency to promote the health, comfort, safety and welfare of society.

Touching cruelty to animals, the court said: "Laws prohibiting cruelty to animals and providing in considerable detail for the exercise of power necessary to secure that result have found a place upon the statute books and been enforced by the courts for many years, and numerous convictions have been had under such statutes."

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The plumbers have fared better at the hands of the courts than have the horseshoers. Their law provided for a board of examiners from whom certificates must be secured. The board was to work in coöperation with boards of health and with engineers of sewers. The main points of this law have been upheld by the Court of Appeals.

The bake shop law has recently attracted the greatest amount of attention. This law provided for inspection of bake shops and made regulations intended to improve sanitary conditions. It also provided that no employee should be "required or permitted" to work more than ten hours a day. From the outset the fight to secure these regulations was a determined one on both sides. The commissioner of labor earnestly recommended it. Both state and national labor organizations used all their influence in support of it. Finally, in 1895, the law was passed. It was the first state law of its kind and attracted attention as "pioneer legislation." The law almost immediately became the subject of litigation. The clause upon which the legal battle centered was that which declared that an employer should neither require nor permit an employee to work longer than ten hours a day. From one court to another in the state system the case was carried, and the decisions were in support of the provision of the law on the ground that it was a proper exercise of the police power. When finally the Court of Appeals sustained the decision of the lower courts, the issue was looked upon as closed. But an appeal was taken to the United States Supreme Court on the ground that there was an interference with the liberties granted to citizens of the United States by the fourteenth amendment. It will be noticed that in framing the law an effort was made to prevent overtime work performed in accordance with special agreements. The opportunity afforded for overtime work by special agreement between employer and employee had been the loop hole in many of the former laws. The employer could nearly always succeed in inducing his employees to work overtime. To make such an arrangement impossible, an employer was not only not to require overtime work but he was not to permit it. By a vote of five to four the judges of the Supreme Court of the United States decided that

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this provision was an infringement on the right of a citizen to contract for any length of day that seemed to him best, and that such infringement was not of sufficient importance to bring it within the police power of the state. This appears in the words of the decision as follows:

> Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employee if the hours of labor are not curtailed. If this be not clearly the case, the individuals whose rights are thus made the subject of legislative interference are under the protection of the federal constitution regarding their liberty of contract as well as of person; and the legislature of the state has no power to limit their right as proposed in the statute.

In the matter of providing for clean and healthful conditions of labor, it was the opinion of the court that the provisions made for inspection were quite sufficient.

Looking at this decision from the view-point of existing conditions rather than legal theory, workmen reason about it as follows: When applying for work a workman is informed that the work day is more than ten hours. If he insists that ten hours is all he can work he is informed that there is no place for him. If he is already employed and insists on cutting his time down to ten hours, he is informed that his services are no longer needed. Thus he finds himself helpless when he endeavors by individual action to secure a ten-hour day. By uniting their efforts workmen invoke the aid of the law to deprive the employer of the advantage he has in consequence of the large supply of labor. To secure just what they all want, namely the ability to resist the employer in his effort to maintain a longer work day, they induce the legislature to enjoin the employer from permitting his workmen to labor more than ten hours. This was the legal phraseology by which the employer was to be deprived of the ability to "induce" his workmen to

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favor a longer day. The state courts appreciated the practical features of the situation. But the federal court seems to the workmen of the state to have brushed these practical considerations aside, to have listened only to the arguments of the employers and to have been convinced that the employee was suffering a grievous wrong in being deprived of his constitutional right of freedom of contract. Thus they feel that in sustaining them in their abstract right, the court has actually deprived them of the power to secure what they really most desire. Had they themselves appealed to the court, the court might reasonably have held that their rights were in danger of infringement. But they did not make the appeal, they were satisfied and had no feeling that their rights were invaded by the law. They consequently conclude that the court has failed to give fair consideration to the practical exigencies of the situation. They were, therefore, both surprised and chagrined at the outcome of the appeal.[1]

While these various efforts have been made to restrict by law the number of hours that shall constitute a day's work, the leaders of the movement have been making every effort to accomplish the same result by inducing all laborers to refuse to work longer than eight hours. This has proved to be rather a difficult task. It is a comparatively easy matter to induce an organization at its regular meeting to adopt resolutions against a longer day and to enjoin its members from working longer than the prescribed time. Yet to hold the individual members to the agreement after the meeting has adjourned is a task usually beyond the powers of the labor leaders. The seriousness of the matter, in the minds of the leaders, may be inferred from the following statement, in the form of a resolution adopted by the American Federation of Labor:

We advise strongly against the practice which now exists in some industries of working overtime, beyond the established hours of labor.

[1] The New York State *Bulletin* has pointed out in connection with the decisions on the law by the various courts that twenty-two judges have voted at one time or another on this case, and that twelve of these have cast their votes in favor of the validity of the law.

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. . . It is an instigator to the basest selfishness, a radical violation of union principles, and . . . it tends to set back the general movement for an eight-hour day.

The eight-hour day is one of the most important articles in the creed of organized labor. No opportunity for applying it either in a locality or in a special trade is ever lost. As one reads the reports of conventions, the addresses of leaders and the articles in the labor press, it becomes obvious that the policy will be pushed to the end, by trade agreements when possible, by legislation when practicable and by strikes when necessary.

IV

The agitation for the eight-hour day in special trades was for the time completely discouraged by the decision of the court in regard to the law dealing with contract labor on public work. With such a decision on record no progress could be made. The only way out of the difficulty was to change the fundamental law of the state in such a way as to overcome the objections of the court against the law. The machinery of the state organizations was accordingly at once set in operation to accomplish this result. Other important measures were for the time laid aside. All organizations were interested. The state federation became the champion of the cause, and all its various departments were set in operation. Resolutions were adopted. Legislators were interviewed. Local organizations sent resolutions to their respective representatives at Albany. Finally the resolution for amendment of the constitution was adopted. As the prescribed process of amendment of the state constitution requires that a resolution shall pass the legislature twice before it may be submitted to popular vote, the first vote of the legislature adopting the resolution was only a beginning. The men immediately interested kept busily at work in the interval. When the time for the second legislative action came, they were on hand. The second vote was favorable, and at the last general election the matter was submitted to the voters of the state. As voting on amendments goes in the state, the advocates of the measure had everything in their favor. While the vote on the amendment fell far short of that cast for the candidates, yet

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the amendment was adopted by the safe margin of two to one of the votes cast,[1] and is now a part of the constitution of the state. The amendment is inserted in that part of the constitution which confers upon the legislature the power to provide for the organization of cities. It adds to the other powers of the legislature in the matter the following:

> . . . and the legislature may regulate and fix the wages or salaries, the hours of work or labor, and make provision for the protection, welfare and safety of persons employed by the state or by any county, city, town, village or other civil division of the state, or by any contractor or subcontractor performing work, labor or services for the state or for any county, city, town, village or other civil division thereof.

Such a provision seems to overcome all the objections of the courts. The amendment was evidently attached to the clause regulating the relations of cities to the state in order to overcome the objection that the law was an infringement upon the rights of local self-government. Whether the amendment will stand the test of scrutiny by the federal Supreme Court in the light of the fourteenth amendment is, of course, a question that cannot be answered. It is certainly not beyond the bounds of possibility that a case may be referred to that court for a decision, since an important part of the reasoning by which the state court annulled the law rested on the proposition that the law was not only an infringement of the rights of cities but that it was also an infringement of the individual right of the contractor, and that it was legislation in favor of a class.

As soon as the last session of the state legislature opened bills were brought forward to meet the requirement, of the new situation. After many amendments and much discussion the old law, so far as it had been repealed, was reënacted. Some attempts were made to obviate the defects which practice had revealed in the previous measure. They were abandoned, however, when confusion threatened to delay the bill, and no important amendments were made. Some dissatisfaction has arisen among labor leaders since the law was passed because, as they say, it is not properly enforced. It seems to have been

[1] The entire vote on the amendment fell a little short of 500,000.

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overlooked by them that contracts made in the old régime must hold during the period for which they were drawn. No one can, therefore, undertake to pass judgment on the new law until it has had a fair trial.

V

The movement which has culminated in the amendment of the constitution of the state is seen from the preceding sketch to have advanced by a series of distinct stages. Each new change has been made because of legal difficulties which have been suggested by experience. In its first form the law was of no practical use. It reads as if a bit of the spirit of the seventeenth century had invaded the legislative halls of the nineteenth and induced the legislators to believe that a statement could have binding force when it carried no penalty for its enforcement, but instead a clause opening the way for evasion. More practically, it may be assumed that the agitators looked upon the enactment as a first gain, of no importance in itself but of considerable importance as a beginning, and that the legislators considered it a harmless concession to a very active and determined group of electors.

Any further limitation on the rights of employers and employees to determine for themselves the length of the working day and the compensation therefor could of course be made to apply most easily to those who work for the state or a municipality or on public work being done by contractors. This provision of the law being added, the hope doubtless was that with the state as a model employer setting the example of an eight-hour day other employers could the more easily be induced to follow. Apparently the leaders of the movement were surprised to find that the law was not enforced, that it needed a sting in order to inspire respect. Renewed agitation secured the sting in the form of an amendment to the penal code making it a crime to fail to comply with the form of contract described. Then there was no more evasion. The matter was brought to an open issue in the courts.

The decisions of the courts have revealed only one important difference between the prevailing and dissenting opinions. This

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difference touches the relation of the city to the state. There seemed to be no thought of compelling all employers to adopt an eight-hour day with the prevailing rate of wages. On the other hand it was early and positively decided that the state could prescribe any conditions it deemed best in regard to work done for the state. This is a matter of expediency in reference to which the decision rests entirely in the hands of the legislature. But could the state compel a city to have its work done after a certain prescribed manner, and further, could it dictate a contract to be adopted by the city and its contractors? That was the point in contention before the courts. The prevailing decision declared that by virtue of the constitutional relation established between the state and the cities thereof, a city was more than an agent of the state. It had powers and rights which were not subject to the control of the state legislature. The rights of a city to contract for its public improvements after any manner that seems best to its officials is included in the rights that lie beyond the control of the state legislature. Yet the dissenting opinion held with strong logic that the city was in all respects an agent of the state government. Its charter emanated from the legislature. It had no powers beyond its charter. Therefore it had no powers not granted by and consequently not revocable or limitable or modifiable by the legislature. Such being the relation, the legislature clearly had a right to prescribe the conditions of contract.

Here was a fine point of law. Moreover, much of the decision was *obiter*, and a change in the personnel of the court or a technicality of procedure might reverse the substance of the decision. The matter would, consequently, be always in doubt. An amendment to the constitution appeared to be the only way in which the question might be finally settled.

While the principal question discussed in the leading cases was that of the relation of cities to the state, the economic phase was not entirely overlooked. In one of the decisions a justice dissented for the reason, in part, that "prevailing rate" is an indefinite term and therefore unsatisfactory in the law. Others saw in the provision that if a contractor paid more for labor than was "necessary," it was in substance an appropria-

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tion of public funds for the benefit of a class. It was also an interference with free competition. These prove upon careful examination to be hasty conclusions. It is true that fair and open competition is the most satisfactory means of adjusting wages and that wages so adjusted will in the end be most nearly equitable, from an economic as well as from a general social point of view. Now what is the "prevailing wage?" It is a wage rate that has been established by competition: competition between organized capital on the one side and organized labor on the other. It may be true that one side or the other has had some temporary advantage and has succeeded in affecting wages accordingly. But in what does the wage rate consist when *not* the "prevailing" wage? In that case it is an adjustment between organized capital on the one hand and unorganized labor on the other. In such competition there can generally be nothing fair and open. The advantage of one side is too great. The prevailing rate is probably the nearest practical approach attainable in our present industrial organization to a rate fixed by fair and open competition. The state can never enter into a competition that will not be one-sided. It therefore will do best to accept the result of competition that has been working in circumstances that are most nearly fair. What is true of the prevailing wage is also true in the adjustment of hours.

There will still stand against this method of adjustment the objections that are so often raised against any particular application of a union scale of wages. The laborers all receive the same pay while all are not equal in skill, strength or endurance. Each man ought to be paid for the work he does, and not in accordance with a scale which he does not fit. The best workmen are not encouraged to do their best and indolent workmen are carried along by their fellows. It should be the privilege of each man employing labor to bargain with each individual laborer. Such claims have undoubtedly much force, and they serve as an indictment from which the organized upholders of a wage scale will have some difficulty in securing a verdict of not guilty. Yet this difference of opinion as to the advantages and disadvantages of an established union wage scale is one to be

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adjusted by experiment and observation in the industrial world. In the meantime, work for the state and city must continue and wages must be paid. The law as expressed by the amendment recognized that organization among employers is an accomplished fact, and that such organization gives the employer a decided advantage in "higgling" for wages. It decrees that wherever organizations of labor and organized employers have reached a satisfactory working scale of wages, such scale shall be adopted in cases of work done for city or state. It is the most practical working arrangement feasible in our industrial world as at present organized.

Those who have been concerned in a practical way with the working out of this problem have been confronted with a difficult task. There is the economic side, with the attempt to adjust wages in such a way that those performing the labor shall be treated fairly; that those for whom the labor is performed shall not be unjustly treated, especially in the case of contract work; and that public funds shall be expended with the same care as would be exercised in private enterprises. While these points are to be observed, at the same time the economic principles which fundamentally control the fixing of wages must not be violated. In addition to this, there is also the constitutional side of the problem. Here arises the delicate matter of adjustment between the authority of the legislature from which all charters for municipal corporations emanate; the principles of local self-government; and the general principles of the common law either expressed or implied in the federal constitution—as well as in the state constitution—which overlooks the relation between cities and states but which takes all citizens under its protection. To accomplish this task in a practical way is the purpose of the amendment. Whether it conforms to all the principles of law will be a matter for the judiciary to decide. Whether it conforms to all the principles of economic and social science can only be determined by experience.

GEORGE GORHAM GROAT.

NEW YORK CITY.

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MUNICIPAL CODES IN THE MIDDLE WEST.

IN every country the organization and power of municipal corporations have at first been regulated by special laws or charters for each community. But in the course of time the tendency has been to establish a general and more or less uniform system within each organized government. Thus in ancient history the early self-constituted city governments in the Italian peninsula were reorganized after the extension of the Roman dominion, about the time of Sulla; and the main features of this municipal system were later extended throughout the Roman Empire. After the breakdown of that empire special charters again appeared throughout western Europe. But since the end of the eighteenth century these have been replaced in practically all the European countries by general municipal codes. France led the way in this movement, at the time of the Revolution. Prussia followed this example in 1808 and England in 1835. Other countries have one after another adopted the same method of procedure.

Special charters and special acts of the legislatures were the only methods of organizing municipal government in the United States until the middle of the nineteenth century. In 1851 the second constitution of the state of Ohio began the attempt to secure general laws by prohibiting special legislation. Other states adopted similar provisions in their constitutions, at first slowly, but more rapidly since 1870. And now most of the states attempt in one way or another to prohibit or restrict special legislation on municipal government. A few, however, such as Massachusetts and Michigan have no constitutional restrictions; and special charters are still openly and freely enacted.

But even in most of the states where special legislation is prohibited, there have been no comprehensive systems of municipal organization established. By the device of classification, laws general in form have been enacted, which in fact applied only

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to single cities. Until within a few years such laws have been generally accepted as complying with the constitutional provisions. As a result, there is nothing approaching uniformity or system in the government of cities in most of the states. And for the country as a whole the diversities have been so numerous and so far-reaching that any attempt to describe the typical American municipal organization has been impossible.

A few states, however, are now exceptions to this rule. Three of these are the neighboring states of Illinois, Ohio and Indiana, forming a compact group in the central part of the country. The Illinois law was enacted in 1872, and was probably the first effective municipal code in the United States. Ohio and Indiana have also had nominal codes for a long time; but the schemes of classification were so highly developed as to prevent any general system of organization. But within a few years both of these states have enacted new municipal codes establishing a general plan. This recent legislation suggests a comparative study of the codes of the three states. While these states agree in the method of dealing with the problem, and while the systems adopted have some features in common, illustrating present tendencies throughout the United States, there are also many and wide divergencies which show the absence of any consensus of opinion on this question among American legislators.

Illinois

The Illinois Cities and Villages Act is said to have been drafted by the late Judge M. F. Tuley, of Chicago. At the time of its enactment it was undoubtedly the best and most successful measure on the subject of municipal government that had been adopted in the United States. It has been amended from time to time, but its main features have been unaltered. And while it has proven inadequate to meet some of the conditions that have since developed, it still contains much that is worthy of study by the legislators of other states.

A comparatively simple and elastic plan of municipal organization is provided by this act. In every city there must be elected a city council, a mayor, a city clerk, a city attorney and

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a city treasurer. Other officers may be created by the city council as needed.

Members of the council are elected by wards, two from each ward, for a term of two years, one alderman from each ward retiring each year. Their number varies from six to seventy, according to the size of the city. The powers of the council include a long list of enumerated subjects of police regulation, such as is usual in city charters; the power of making appropriations and a limited power of taxation; and the unusual power to create municipal offices. The latter power requires a two-thirds vote of all the members of the council, and offices so created may be abolished only by a similar vote at the end of a fiscal year. This restriction and the provisions by which the council cannot itself make appointments to offices has prevented any abuse of the power to create offices. The control over appropriations is also an important power actively exercised by the council, in the large cities mainly through the finance committee. These two special powers make the councils of Illinois cities much more important factors in the municipal organization than in other American cities.

But the mayor also has important powers. He is elected for two years,[1] presides over the city council, has the usual limited veto power and has large authority over the appointment and control of the city officers. His appointments to office must be confirmed by the council, but usually this confirmation has been given without question, and in Chicago at least generally without even reference to a committee. His control over the appointed officers is further established by his large power of removal. This is not entirely unlimited, as he is required to file the reasons for removal with the council, and if he fails to do so, or if the council by a two-thirds vote disapproves of the removal, the officer is reinstated. But these restrictions are not likely to be effective except in the case of a gross abuse of the removal power; and in fact the mayor has a very substantial control over the city officers and can be held responsible for the conduct of the administrative branch of the city government.

[1] By a special law passed under the recent constitutional amendment the mayor of Chicago will in future be elected for four years.

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Popular election of the city clerk, city attorney and city treasurer shows the influence of the earlier movement for the election of all city officers. At the time the Illinois law was enacted there was a smaller number of elective officers than was common in most American cities. But at present the trend of intelligent opinion on municipal organization would favor making at least the clerk and attorney appointive in the interest of administrative efficiency. In fact Chicago and perhaps other cities have established the appointive office of corporation counsel, and the office of city attorney has become of little importance.

The most serious weakness of the Illinois law is the narrow limit placed on the power of taxation, which has prevented the city governments from developing their activity to meet the needs of increased population. This has in turn promoted the tendency to create by additional legislation special authorities independent of the city governments to undertake certain local works, which might better have been intrusted to the city corporation. Thus not only boards of education, but library boards, park boards and the sanitary trustees in Cook county are separate corporations, adding greatly to the complexity of local government, tending to confuse the voters with a multiplicity of elective offices and reducing the effective responsibility to the community of those special officials.

Chicago has suffered most from the limitation on financial powers and the multiplication of authorities. With forty times the population of any other city in the state, the metropolitan community has had to meet problems that have not begun to arise in the smaller cities. The unsatisfactory local situation, with the difficulty of securing adequate changes in the general law, has led to the adoption of a constitutional amendment authorizing special legislation for Chicago, subject to approval by a referendum vote, and a special commission is now drafting a new charter for Chicago to be submitted to the next session of the state legislature.

Doubtless some special provisions are almost necessary for a city so vastly different as is Chicago from the others in the state. But many of the difficulties affect the smaller places only in a less degree; and many of the changes to be made ought to be

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made in the general law. And it is to be regretted that the ability of Illinois legislators has so far declined and they seem unable to perfect and adapt to modern conditions the excellent law that was passed over thirty years ago.

Ohio

The second constitution of Ohio, adopted in 1851, made the first attempt in the United States to prohibit special legislation for cities and to require the establishment of a general system of municipal organization. But by the device of classifying cities on the basis of population, all the larger cities in the state had many peculiar features in their municipal government, established by laws which in fact applied only to single cities. And for over fifty years the Supreme Court of the state accepted laws of this kind, general in form but special in their application, as complying with the constitutional provisions.[1]

In 1902, however, the Supreme Court practically reversed its former attitude and held that the whole body of legislation on municipal government disclosed the legislative intent to substitute isolation for classification. Certain acts brought before the court were declared unconstitutional, and the opinion showed that most of the legislation in cities would be held unconstitutional if brought before it.[2] This situation led to a special session of the state legislature, which enacted a new municipal code for all the cities and villages in Ohio. In framing the original draft of the bill Governor Bushnell took an active part; and in the work of the conference committee to decide conflicts between the two houses the final determination was said to have been due in large measure to the influence of a United States senator and the leader of the dominant political organization in Cincinnati.

The Ohio code is much more detailed than the Illinois law.[3] It provides a numerous and complicated list of elective offices, burdensome to the small cities, and with a lack of effective organization and clearly defined responsibility.

[1] State *v.* Pugh, 43 Ohio State, 98.
[2] State *v.* Jones, 66 Ohio State, 453.
[3] Wade H. Ellis, The Municipal Code of Ohio.

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Cities are defined as municipal corporations of over 5000 population, and the same organization is applied to all the seventy-two cities in the state. The city council consists of a single chamber, the number of members varying with the population. The larger number of members are elected by wards, each electing one councilman; but a small number are also elected on a general ticket for the whole city. The powers of the council are restricted to those of a legislative character; and it is expressly provided that it shall perform no administrative duties and exercise no appointing power, except in regard to its own organization and in confirming nominations to certain positions named in the act. The powers granted include authority to enact police ordinances, to vote appropriations and taxes, to determine the number of members on certain municipal boards and to fix the salaries and bonds of the statutory municipal officers. But there is no power to create municipal officers similar to that in the Illinois law; and even the establishment of minor positions is given to the executive officers. It may by a two-thirds vote remove officers after a trial on definite charges.

The mayor is elected for a term of two years. He has a limited veto power and a very restricted power over the selection of officials. Most of the important officers are elective; but the mayor nominates, subject to the confirmation of the council, members of the boards of public safety and health and appoints the members of the tax commission and the library board. It is made his duty to have a general supervision over all departments and city officers; but he has no power of removal or any other effective means of control over their actions. The narrow range of his authority is further indicated by the provision which vests executive power, not in the mayor, but in the list of elective and appointed executive officers.

Other elective officers are the treasurer, auditor, solicitor and the board of public service. These are all elected for two years, except the auditor, whose term is three years. The board of public service is the most significant of these. It consists of three or five members; and has charge of streets, sewers and other public improvements, of municipal water and lighting

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plants, parks, markets, cemeteries and of all charitable and correctional institutions.

Of the appointed officers, the board of public safety is provided for in a very peculiar way. This is a bi-partisan board of two or four members, having supervision over the police and fire departments. Its members are appointed on the nomination of the mayor subject to the confirmation of *two-thirds* of the council, and failing this confirmation appointments are made by the governor of the state. This method was apparently adopted for political purposes, and under it the boards of public safety in about a dozen cities have been appointed by the governor.

The board of tax commissioners is also a bi-partisan body, consisting of four members appointed by the mayor, serving without compensation. To this board are referred the tax levies ordered by the council to cover its appropriations, and if it disapproves any item of the appropriation the tax levy must be reduced, unless the action of the board is overruled by a three-fourths vote of all the members of the council. The board also acts as a sinking fund commission.

By establishing a general system of municipal organization and uniform powers this code makes the law of municipal corporations in Ohio much simpler and more intelligible than formerly. The volume of litigation on municipal government is greatly reduced, and litigation to determine the meaning or constitutionality of disputed points is also lessened, since a decision for one city determines the point for all. The scope of municipal activities has not been enlarged, but every city may without further legislative action exercise all the powers that have been granted to any one.

In the organization of the council the plan of electing some members at large offers an opportunity for strengthening that branch of the municipal government. But the system of artificial and changeable wards is also retained, with its opportunities for gerrymandering. The board of public service absorbs the functions formerly given in many cities to a number of boards, and thus simplifies to some extent the municipal organization. But it may be questioned whether in the large cities

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this has not placed in one department too many unrelated services. The provisions authorizing the merit system in the police and fire departments are at least a slight concession to the demand for eliminating spoils politics from the municipal service.

But in other respects this code is open to serious criticism. The number of municipal officers required in all cities is too cumbersome for many of the small cities; and the city council might well have been given authority to create offices as needed, as in the Illinois law. The number of elective officers is too large to permit the voters to learn the qualifications of the various candidates; and this tends to reduce popular control and increase the influence of party organizations. The variety in the methods of filling various offices prevents the concentration of responsibility; and in particular the authority of the mayor is inadequate. No provision is made for the merit system for the larger proportion of municipal employees, who are placed under the control of the board of public service.

Since this code was adopted there have been two sessions of the Ohio legislature. At each of these some minor amendments have been passed. The most important is the change in the date of municipal elections from April to November in the odd years. By changing the date of state elections in the future to the even years, municipal elections will be kept distinct from state and national elections; and with that provision there is perhaps some advantage in having all elections come in the fall. During the session of 1906 an effort was made to make some more important changes in the system of organization, especially by increasing the powers of the mayor. But nothing was accomplished.

Indiana

In 1905 a general revision of the Indiana municipal law was enacted by the legislature of that state. There was little public discussion and apparently no partisan motives affected the measure. The code as enacted simplifies somewhat the system of organization, and applies to all but the smallest places the centralized plan of mayoralty control which had been previously established in the larger cities.

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One of the most important changes was the abolition of spring city elections and the extension of the terms of city officers from two to four years. The terms of officers which would have expired in the spring of 1905 were continued until the following January; and beginning in 1905, an election will be held for city officers in November of every fourth year. While spring elections are abolished, municipal elections are not combined with state and national elections, but as in Ohio come in an intervening year. Another provision making all elective officers ineligible for two terms in succession will, however, hinder the development of a continuous policy and seems entirely uncalled for, at least in the case of the members of the councils and the city clerk.

Municipal corporations are divided into two main classes: incorporated towns and cities. Any community may by popular vote be incorporated as a town; any community with more than 2500 population may become a city; and both cities and towns may be dissolved by popular vote.

A very simple system of organization is provided for the incorporated towns. Provision is made for the election of a board of trustees of three to seven members, one for each ward, but all elected at large; also for the election of a clerk and treasurer, or one person to act in both capacities. The trustees shall elect one of their number as president; shall appoint a marshall, who may also act as street commissioner and chief of the fire force; and shall have general charge of municipal matters in the town.

Cities are divided into five classes on the basis of population at the latest United States census; but the systems of government for the different classes are along similar lines. The first class includes cities over 100,000 population, of which Indianapolis is the only instance. The second class includes cities from 45,000 to 100,000, of which at present there are two—Evansville and Fort Wayne. The third class, from 20,000 to 45,000, has five cities—Terre Haute, South Bend, Muncie, New Albany and Anderson. The fourth class, from 10,000 to 20,000, has eleven cities; and the fifth class, those under 10,000, includes about fifty cities.

Variations in organization provided in the act are, however,

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less frequent than the number of classes. The arrangements for the first two classes are practically identical; and also those for the third and fourth classes. There seems no substantial reason why there should have been more than three classes established.

Every city elects a council, a mayor and a city clerk. A city judge is also to be elected, except in cities of the fifth class, where the mayor acts in that capacity. A city treasurer is elected, except in cities of the first three classes which are county seats, where the county treasurer acts as city treasurer.

The council consists of one member from each ward, and from two to six members elected at large, the number of members at large to be half as many as the number elected by wards. Boundaries of wards may be changed once in six years by a two-thirds vote of all members of the council. The powers of the council include authority to establish police regulations in a long list of enumerated cases. New features in this list are the power to exclude saloons from the residence portions of cities, the power to regulate the height of buildings and the power to regulate railroad traffic within the city limits. The council can also levy taxes, vote loans up to two per cent of the taxable value of property and manage the finances. But it is provided that if a council fails to fix the tax levy and make appropriations before the first Monday of October, the levy and appropriations for the preceding year shall be continued and renewed for the current year. In cities of the fifth class council committees may exercise executive functions.

The mayor is given important and far reaching powers. He has the absolute power of appointing the heads of all departments in cities of the first four classes; and most of the executive officers in cities of the fifth class. These officers will not hold for any specified term, but any of them may be removed by the mayor, who is required to give notice to the officer and to state in a message to the council the reason for removal. This arrangement clearly makes the mayor responsible for the conduct of the executive departments, but at the same time encourages permanence of tenure in the management of these departments by requiring the mayor to state publicly his

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reasons for exercising the power of removal. This system is moreover not introduced on purely theoretical grounds, but has already proven its practical advantages in a number of the larger Indiana cities.

Monthly meetings of the mayor and heads of departments are provided for; and this "cabinet" is authorized to adopt rules and regulations for the administration of the departments, including rules "which shall prescribe a common and systematic method of ascertaining the comparative fitness of applicants for office, position and promotion, and of selecting, appointing and promoting those found to be best fitted."

The mayor has also the usual limited veto power, including the right to veto items of appropriation bills, the power to recommend measures to the council and to call special sessions of that body. In cities of the third, fourth and fifth classes he presides over the council; he can also appoint special examiners to investigate the accounts of any department or officer at any time.

Executive officers and departments are regulated in considerable detail by the act, with variations for the different classes of cities. But in the main a uniform method is followed.

In cities of the fifth class there is a marshal, chief of fire force, street commissioner and board of health and charities appointed by the mayor, and a city attorney appointed by the council. Other executive functions are performed in these cities by council committees.

In the cities of the first four classes there are from five to eight departments. All cities in these classes have departments of finance, law, public works, assessment and collection and public health and charities. A department of public safety, controlling the police and fire force, is provided for cities of the first and second class, and is optional for cities of the third class. The variation seems to be due to the provision in the former law for state police boards in cities from 10,000 to 35,000 population. A special department of public parks is also provided for cities of the first two classes. By a peculiar arrangement cities of the second class are allowed to establish a special department of water works, which in other cities comes under the department of public works.

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The departments of finance, law and assessment and collection are placed in charge of single officials—the comptroller, city attorney and the elected treasurer. The assessment of property for taxation is, however, not regulated by the municipal code, but by a general law on the subject for the whole state. Where a city establishes a sinking fund, there is provided a sinking fund commission, consisting of the comptroller and two other members appointed by the mayor—in this case the terms of the latter two members expiring at different times.

The other departments are in charge of boards, consisting of three members each, except for the park boards, which have four members. In all cases not more than two members of each board may belong to the same political party.

Salaries are regulated for the various classes of cities with too much detail. In some cases maximum salaries are specified; in others a minimum and maximum. But there is little discretion left to the councils; and with the growth of cities it is certain that there will be frequent amendments to the law in this respect. Of the boards, that for public works is allowed the largest remuneration; the board of public safety has a distinctly smaller rate; the board of health has a maximum of one hundred dollars for each member, while the park board must serve without compensation.

If municipal departments must be regulated by statute the Indiana plan of varying the system with a reasonable classification of cities is much better than the hard and fast provisions for all cities in the Ohio law. But in this respect the Illinois act, which permits the city councils to establish offices and regulate salaries, is better than either of the other laws.

Municipal ownership is authorized for water works, gas works, electric light works and heating and power plants, after a referendum vote. But the debt limit of two per cent of the taxable value is likely to prevent most cities from undertaking all these functions.

All franchises previously granted are legalized; and authority is given to grant new franchises, with no statutory restriction as to the term of the grant, while contracts for a supply of light, water or heat for city purposes may be made for periods of

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twenty-five years. In these respects the new law shows a distinct reactionary movement in the interest of private corporations. Formerly franchises were limited to periods of ten and thirty-four years, according to the kind, and contracts for light were limited to ten years.

No simple verdict can be given on the act as a whole. The relaxation of the restrictions on franchise corporations is likely to prove a serious evil. The prohibition on the reëlection of members of the council will promote unneccessary changes in public policy. The opportunity to introduce other improvements has been neglected, and the act is far from perfect in respect to systematic arrangement of its various parts.

On the other hand, so far as concerns the organization of the municipal government, the measure is a decided advance on previous conditions in Indiana and a still greater improvement on existing conditions in other states. It is of no little advantage to have the law on this subject reduced to simpler and more systematic terms. This should reduce the amount of litigation in the courts and make the municipal system one that can be generally understood by the people. The centralization of executive powers and responsibility in the mayor should clarify the situation for the voters on election day, and the opportunity given by the law for the establishment of the merit system in the municipal service is at least a step in the right direction.

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ALSACE-LORRAINE

AND ITS RELATION TO THE GERMAN EMPIRE

IN the peace preliminaries between the German Empire and France, February 26, 1871, the cession of Alsace-Lorraine definitely fixed the international status of that territory and determined its relation to all other states, including France. Article i, clause 1 of the peace preliminaries declares that "France renounces in favor of the German Empire all her rights and title to the territory lying east of a boundary line hereafter designated." Clause 2 fixes the line thus referred to, while clause 3 adds: "The German Empire shall possess this territory forever, in full sovereignty and with all the rights of ownership." By this act all the interests of France in Alsace-Lorraine passed to Germany, and the actual possession of the territory effected by conquest in August, 1870, received its formal recognition.

The settlement of the question of the status of Alsace-Lorraine with respect to international law served merely to raise the question as to its status with respect to constitutional law. The peace preliminaries determined the relation of the territory to third powers, but it did not, and could not, determine its relations to Germany. Here was a problem which touched the internal organization of the empire. By the fortunes of war, Germany found herself possessed, one might well say repossessed, of a considerable territory, for the disposition and administration of which the imperial constitution made no provision. The adjustment of the new fact to the theory of the constitution, the mortising of the new acquisition into the existing framework of German federal government, was the task laid upon German jurists and statesmen.

In the solution of the problem three ways were open: to erect the new territory into a state, with rights and powers equal to those possessed by the other federated states; to incorporate Alsace-Lorraine into the territory of one of the exist-

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ing states; or to hold it as imperial territory, under the sovereign control of the empire and administered by organs of the imperial government, wholly independent of any and all of the federated states as such.[1] At no time was the idea held, at least to any extent, of making Alsace-Lorraine the twenty-sixth state in the Union. Although such a proceeding could have been carried out by means of a constitutional amendment, too many political objections stood in the way. The third solution of the problem—a territorial status under the immediate control of the empire—seemed to present the fewest difficulties, and it was therefore chosen. For such a relationship, however, the imperial constitution made no provision. It recognized no part of the empire which was immediately subject to the central authority or which was to be looked upon simply as the object of imperial powers. The constitution assumed that, between the individual "*Gebiete*" with their people and the imperial power, a state power was interposed, and that each state into which the territory of the empire and its population was organized was a subject or holder of rights, a member of the empire, and as such had a share in the empire itself.[2] It is evident that the theory upon which the federal organization of the empire is built—the theory of mediate government through the states—could find no application to Alsace-Lorraine, unless that territory should be erected into a state. Where a territory is governed wholly and exclusively by the central authority; where self-government and autonomy, in the sense in which these words apply to federated states, are wanting; where the laws are not laws by the territory, but laws by the central government for the territory, the federal idea fails. This is precisely the situation in Alsace-Lorraine. The relation between the empire and Alsace-Lorraine is not that of a federal government toward one of its member states, but that of a unitary state toward one of its provinces. And this must always be the relation between a federal state and its territories. True, the territory may be granted large powers of self-government, but, unlike the powers of self-government exercised

[1] Hænel, Staatsrecht, vol. i, p. 824; Anschütz, in Holtzendorff-Kohler, Encyclopädie der Rechtswissenschaft, vol. ii, p. 559.

[2] Laband, Staatsrecht, vol. ii, p. 198.

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by a state under the federal form of government, these powers are not original but derivative. The federal government gave and the federal government may take away.

The German jurists and statesmen harbored no fond delusions with respect to the newly acquired territory and the imperial constitution. The constitution did not extend to these annexed districts *ex proprio vigore*. It had no footing there until it was carried thither expressly by imperial legislation. This fact is clearly recognized in the law on the union of Alsace-Lorraine with the German Empire, of June 9, 1871. This law, after declaring that the land acquired from France by cession was forever united to the German Empire, fixed a date on which the imperial constitution should go into effect there. It says:

> The constitution of the German Empire shall go into effect in Alsace-Lorraine on January 1, 1873.[1] By order of the emperor, with the consent of the Federal Council, individual parts of the constitution may be introduced earlier.[2] The amendments and additions which may be necessary require the consent of the Imperial Diet. Article 3 of the imperial constitution [providing for a common *Indigenat*] shall go into effect at once.[3]

In other words, the constitution was made for the states, not for the territories, and it entered the territories only when carried there by federal law. The law by which it was introduced may be amended or repealed at any time without the consent of Alsace-Lorraine.[4]

The introduction of the imperial constitution into Alsace-Lorraine did not simplify the relations of that territory, either with respect to the empire or to the several states of the union. Many difficulties have arisen in determining its exact legal position. It is treated in many respects as if it were actually a member of the union; but since the union is regarded as a union of states, and since this territory, unlike the territories in the

[1] Afterward extended to January 1, 1874. See *Reichsgesetzblatt*, 1871, p. 208.

[2] *Cf.* Triepel, Quellensammlung, p. 111, note 5.

[3] Law of June 9, 1871, sec. 2, *RGBl.*, 1871, p. 212.

[4] Compare Hænel, *op. cit.*, p. 834.

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United States, is not even a "state in the making," membership in the empire is not attributed to it.

> Neither with respect to the empire, nor with respect to foreign states, is Alsace-Lorraine an independent subject of sovereign rights, with constitutional powers and obligations. It is logically no state, but a part [*Bestandteil*], an administrative district, of the empire. . . . The contrast between the territory and the member states of the empire coincides exactly with the contrast between a decentralized unitary state and a federal state.[1]

A glance at the historical development of the organization of Alsace-Lorraine will serve to make its position in the empire more clear. In considering the evolution of its territorial government, five periods may be distinguished, each of which must be briefly noted.

I. The period of military dictatorship, from August, 1870, to June, 1871. This period must be subdivided into two minor ones: (1) from August 14, 1870, the date of occupancy by the German troops, to the cession of the territory by France, February 26, 1871; (2) from February 26, 1871, to the annexation of the territory by the law of June 9, 1871, which went into effect June 28, 1871.

(1) During the first of these two minor periods, Alsace-Lorraine was placed under the authority of a military governor-general, who was appointed by the king of Prussia, and who acted, not in accordance with the principles of the North German constitution, but with the principles of international law touching such cases. By the mere act of occupation by hostile troops and by the assumption of military control by the commanding officer of those troops, Alsace-Lorraine did not cease to be French territory; but the power of France was suspended and French legislation was excluded in the districts occupied. In such districts the commander-in-chief of the German army, or his appointees, had the right to exercise the authority usually exercised by the state, subject only to the limitations

[1] Laband, vol. ii, p. 199.

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fixed by international usage.[1] Nor was the occupied territory subjected during the war to the German state, the empire, which was erected only on January 1, 1871. It was simply in the military power of the allied German forces.[2]

(2) On the conclusion of peace between Germany and France, no immediate change took place in the governmental organization of the ceded districts. The government of Alsace-Lorraine was, however, put upon a different legal foundation. It no longer rested upon a military basis, but upon a legal basis created by the transfer of the territory, with all right and title therein, to Germany. Through this treaty of transfer, the status of Alsace-Lorraine with respect to third powers was definitely fixed. Its status with respect to the empire, however, was a matter of German constitutional law. The fact that the German Empire was composed of states did not make Alsace-Lorraine a state. Prior to the conclusion of the treaty it had been simply an integral part of a unitary state. The mere act of signing the treaty did not give it a character which it did not possess before. The government which had been temporarily set up during the period of military occupation continued after the conclusion of peace, until, on June 28, 1871, Alsace-Lorraine was formally annexed to the German Empire by imperial legislation.

II. The second period, from June 28, 1871, to December 31, 1873, may be termed the period of the dictatorship of the German emperor. The key to this period is furnished by the law of June 9, 1871, the law of annexation. This law did not determine the position of Alsace-Lorraine in the empire in explicit terms which left no room for dispute. The law is silent upon the

[1] The occupation did not, therefore, *ipso facto* annul the French laws in force nor dissolve the general organization of the territory occupied. It did not destroy private obligations. A new power took the place of the French state and carried on the government as already organized, so far as this could be done under the circumstances.

[2] Laband, vol. ii, p. 237: "In the invested districts, therefore, the king of Prussia, as commander-in-chief of the German forces, exercised authority based not on constitutional law but on international law. So far as the government of this French territory was concerned, he did not exercise the power of the German state but of the French state. Hence the ordinances issued during the occupation are not to be regarded as acts of the German Empire but as acts of the German commander-in-chief, carried out in place of the French sovereignty at that time suspended."

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direct question of the status of the new territory with respect to the imperial system. It is clear, however, that Alsace-Lorraine did not become a member of the empire, for the members of the empire are states and Alsace-Lorraine was not a state. It became possessed of none of the rights belonging to the several states, growing out of their membership in the empire. The fact that the law of annexation fixed a date on which the imperial constitution should go into effect in the newly acquired territory showed conclusively that the constitution did not extend to the annexed districts *ex proprio vigore*. It follows that such rights as did exist were rights based on law, not on the constitution; that they were rights granted, not rights reserved.

The first clause of section 3 of the law of annexation declares that the state power in Alsace-Lorraine shall be exercised by the emperor. Under this provision the government of Alsace-Lorraine immediately took on a strongly monarchic aspect. It must be borne in mind, however, that as wielder of the state power in Alsace-Lorraine the emperor was not acting in his own name or in his own right. The power that he held was delegated power, and he exercised it solely as an organ of the empire. Alsace-Lorraine was imperial territory, and whatever authority was exercised there was imperial authority, exercised by imperial organs. The emperor did not become the ruler of Alsace-Lorraine in the sense in which he is ruler of Prussia, nor was Alsace-Lorraine joined with Prussia in a personal union.[1] The emperor was simply an imperial organ, exercising imperial power in an imperial territory.

In centralizing the legislative and administrative powers in Alsace-Lorraine in the hands of the emperor, the law of June 9, 1871, placed upon the exercise of these powers certain limitations, operative both in the sphere of administration and in that of legislation. Thus, for example, clause 2, section 3, says:

[1] Laband, vol. ii, pp, 203, 204: "Elsass-Lothringen ist demnach keine Monarchie, denn es hat keinen persönlichen Landesherren, und ist ebensowenig eine Republik, denn die Gesammtheit der Elsass-Lothringer ist nicht das Subject der Staatsgewalt. Es ist ein Bestandteil oder Provinz des Reiches. Das Subject der Staatsgewalt in Elsass-Lothringen ist das Reich, d. h. die Gesammtheit der zum Reich vereinigten Staaten in ihrer begrifflichen Einheit, in ihrer staatlichen Persönlichkeit."

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Until the time when the imperial constitution shall go into effect, the emperor shall be bound by the consent of the Federal Council in the exercise of legislative power, and in the contracting of loans or the assumption of guaranties for Alsace-Lorraine, which shall impose any burden upon the empire, he shall be bound by the consent of the Imperial Diet also.

Moreover, by the provisions of section 4 of this law, "the ordinances and decrees of the emperor need for their validity the countersignature of the imperial chancellor, who assumes thereby the responsibility." By this provision the imperial chancellor became the sole, supreme head of the administration in the imperial territory, in all its branches; and with him, of course, the imperial chancery, in its various divisions, became charged with the regulation of matters pertaining to the territorial administration.

By the law December 30, 1871, section 4,[1] a new feature was added to the administrative organization of Alsace-Lorraine in the person of a president (*Oberpräsident*), whom the law designated as the "highest administrative authority in Alsace-Lorraine, with his official seat in Strassburg." Section 6 of the law assigned to this president a large sphere of activity in the immediate administration of the internal affairs of the territory, in addition to which the imperial chancellor was "empowered to hand over to him, wholly or in part, the authority which was exercised by the ministers under the French laws still in force." Further, section 5 of the law granted to the president the supervision over the various administrative boards in the territory, as well as over the officials subordinate to them, together with the task of seeing that the laws and ordinances were executed and the administration properly carried out. The president, also, acted in the capacity of an administrative instance in deciding differences arising between the boards subordinated to him and in passing upon complaints and decisions of inferior administrative authorities, or in submitting such complaints and decisions to the imperial chancellor. The president had under him, of course, a number of counsellors and assistants of various sorts such as the business imposed upon him seemed to require.

[1] *Gesetzblatt für Elsass-Lothringen*, 1872, No. 2, p. 49.

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Concerning the legal position of the president, Laband says:

He occupied the constitutional position held by a minister. He was not in a constitutional sense responsible; he had no power to act as the representative of the imperial chancellor; he could countersign no ordinances of the emperor, he was bound to obey the instructions of the imperial chancellor in matters pertaining to the administrative service and stood under his supervision. The law, section 4, calls him the highest administrative authority *in* Alsace-Lorraine. He was not, however, the highest administrative authority *of* Alsace-Lorraine in any single department, but was subordinate, in every relation, to the imperial chancellor as the actual head of the administration . . . He was a higher instance for the whole internal administration; he was competent for almost every ordinance which belonged, under the existing law, to the jurisdiction of the ministry; upon him was laid the fixing of the territorial budget, the preparation of the drafts of laws and ordinances, the communication of instructions and official orders to the district presidents and other district authorities. But he was entrusted with the greater part of these functions only through an administrative order of the imperial chancellor. Legally he was without any responsibility of his own, and, with respect to the imperial chancellor, he occupied a dependent position. As a result the Chancery retained its full importance in all matters which were reserved by special ordinance to the jurisdiction of the imperial chancellor, or which, on account of their consequence, must be brought to his knowledge and submitted to his decision. There were, accordingly, two ministries existing at the same time, the one superimposed upon the other: the presidency, whose advantage lay in its mastery of details and in its more accurate knowledge of local persons and relations; and the Imperial Chancery, whose advantage lay in its larger legal power and in its closer touch with the central authorities of the empire, as well as with the Federal Council and the Imperial Diet.[1]

On May 27, 1871, the Federal Council created a special committee for Alsace-Lorraine, which to-day forms the ninth of the standing committees of that body.

Like the period of military dictatorship, the dictatorship of the emperor was a transition period and was so intended. The law which provided for this centralized monarchic government

[1] Laband, vol. ii, p. 218.

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of Alsace-Lorraine fixed also the date on which it should give way to other arrangements, through the introduction of the imperial constitution into the territory.

III. The third period extended from January 1, 1874, when the imperial constitution went into effect, to May 28, 1877, the date on which the law of May 2, 1877, became operative. With the introduction of the imperial constitution into Alsace-Lorraine on January 1, 1874, in accordance with the law of June 1873,[1] an essential change took place in the relation of the emperor to the affairs of the imperial territory. The monarchic concentration of power in Alsace-Lorraine came to an end. The legislative authority no longer lay in the hands of the emperor alone, with the consent of the Federal Council and Imperial Diet in certain matters; it passed to the ordinary legislative organs of the empire. The legislative power of the emperor, no longer dictatorial, dwindled to the mere engrossment and publication of the laws. His right to sanction the laws for Alsace-Lorraine vanished, and the veto-power which he had possessed in the period of imperial dictatorship disappeared also. From this time the right of sanction lay in the hands of the Federal Council alone.[2] One right, however, was retained by the emperor—a right which was not conferred upon him by the constitution. Section 8 of the law of June 25, 1873, provided that, with the consent of the Federal Council, the emperor might issue ordinances which should have the force of law. Ordinances of this sort must not conflict with the constitution or with the imperial laws in force at the time; they could be issued only when the Imperial Diet was not in session, and they must be laid before that body, for its action, at its next session. Moreover, the law of June 25, 1873, provided for the election of fifteen members to the Imperial Diet from Alsace-Lorraine.

So far as legislative competence is concerned, the introduction of the imperial constitution into Alsace-Lorraine removed the line of division which had split the general territory of the empire into two spheres of legislation. The general legislation

[1] *RGBl.*, 1873, p. 161; Triepel, p. 156; *GBl. für Elsass-Lothringen*, p. 131.

[2] Laband, vol. ii, p. 250, note 1; Haenel, p. 827; Stöber, in *Archiv für das öffentliche Recht*, vol. i, p. 662, note 68; Meyer, *Staatsrecht*, p. 429.

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of the empire extended to all the affairs of the imperial territory, not only to those matters which fell within the general competence of the empire, but also to those which, in the several states, were reserved to state legislation. In the imperial territory there existed no power save that of the empire, there was no law-giver for Alsace-Lorraine save the empire itself. As the law of June 9, 1871, section 3, clause 4, says: "After the introduction of the imperial constitution, until such time as the matter is otherwise regulated by imperial law, the power of legislation, even in those matters which, in the several states, are not subjected to the legislative authority of the empire, shall belong to the empire." No limitations, therefore, such as checked the legislative action of the empire with respect to the individual states, bound it with respect to Alsace-Lorraine.

The introduction of the imperial constitution wrought no change in the administrative organization of Alsace-Lorraine. On October 29, 1874, however, the emperor issued a decree having for its subject-matter the erection of an advisory Territorial Committee (*Landesausschuss*) for Alsace-Lorraine.[1] By the provisions of this decree, the Imperial chancellor was authorized to construct a Territorial Committee by calling upon the three *district assemblies*—Upper Alsace, Lower Alsace and Lorraine—each to elect ten of their number, as well as three alternates, to serve on the Committee. The term of office was fixed at three years; but if a member of the Committee lost his seat in the district assembly in the meantime, his membership in the Committee lapsed. The sessions of the Committee were not to be public, and the emperor reserved the right to determine the time and place of its meeting. The purpose for which the Committee was created, as indicated by the opening paragraph of the decree, was to give expert advice on such drafts of laws as might be laid before it, touching matters concerning Alsace-Lorraine which were not reserved under the constitution to the legislation of the empire. The territorial budget was to be submitted to this Committee. Bills to be presented to the Com-

[1] *GBl. für Elsass-Lothringen*, p. 37; *RGBl.*, 1877, p. 492, as appendix to law of May 2, 1877. *Cf.* also Triepel, p. 213.

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mittee were to be brought to its notice by the president of the territory, who was authorized to attend its meetings either in person or by a representative. The president, or his representative, must be heard at any time on his request. The advice of the Committee was to be had before a bill was laid before the imperial legislative bodies for final determination. It should be noted, however, that the securing of such advice from the Committee was purely permissive. It was not at all obligatory. The competence of the Committee was merely advisory and in no sense legislative.

> The decree [Laband explains] created no principle of law, it had the significance of an instruction simply. Even without the decree the government would not have been restrained from securing expert advice on draft of laws. On the other hand, the securing of such advice was not invested with the character of a legal requirement in territorial legislation.[1]

It is very evident, however, that the creation of such a Committee, even though it possessed no legal powers, served to strengthen the position of the president, in so far as his policy was supported by its advice.

IV. The fourth period begins with the law of May 2, 1877,[2] which marks a significant step toward a larger degree of independence on the part of Alsace-Lorraine, particularly in legislative matters. By the provisions of this law the territorial Committee, which up to this time had possessed advisory powers only, became a fixed and important factor in the legislation of the territory. "Territorial laws for Alsace-Lorraine, including the annual territorial budget, shall proceed from the emperor, with the consent of the Federal Council, when the Territorial Committee, erected in accordance with the decree of October 29, 1874, shall have consented to the same."[3]

Several things should be observed with respect to the law of May 2, 1877. In the first place, a distinction, hitherto non-

[1] *Laband*, vol. ii. p. 219.

[2] Law on the territorial legislation for Alsace-Lorraine, *RGBl.* 1877, p. 491; Triepel, p. 213.

[3] Law of May 2, 1877, sec. 1.

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existent, was drawn between imperial competence and territorial legislation. Perhaps it were more accurate to say that two distinct fields were recognized in which the legislative power in Alsace-Lorraine operated. The passage of the law of May 2 did not in any wise affect clause 4 of section 3 of the law of June 9, 1871—the clause which declared that, after the introduction of the imperial constitution into Alsace-Lorraine, the legislative power in that territory belonged to the empire even in matters which in the several states did not fall within the imperial legislative competence; for section 2 of the law of May 2, 1877, expressly states that the power to enact territorial laws in the form of imperial legislation is reserved. The competence of the empire was, therefore, in no degree limited by this law. A form of legislation other than that provided for by the imperial constitution was, however, introduced in matters affecting the territory. Laws passed by the regular legislative organs of the empire, for the empire at large, would extend also to Alsace-Lorraine; but, by the terms of the law of May 2, 1877, a line of demarcation was drawn between the affairs of the empire in general and the affairs of Alsace-Lorraine in particular. No change was effected in the state power operating in the territory. It was still the power of the empire alone. But now that the Territorial Committee has been converted from an advisory into a consenting body, a distinction arose between laws touching the internal affairs of Alsace-Lorraine and laws concerning the empire as a whole and Alsace-Lorraine merely as a part of that whole. In other words, a distinction was drawn between laws operating *in* Alsace-Lorraine and laws made *for* Alsace-Lorraine. As to the nature of these laws, Laband says:

> Territorial laws for Alsace-Lorraine are at present still imperial laws, *i. e.* laws sanctioned by the empire. Territorial laws for Alsace-Lorraine are *provincial laws of the empire* for Alsace-Lorraine, in matters which, so far as the rest of the empire is concerned, are excluded by the imperial constitution from the competence of the empire. For territorial laws of this sort, the law of May 2, 1877, prescribes a special form. So far as their nature and constitutional significance are concerned, however, they are not, like the laws of the individual states, an expression of autonomy, but a manifestation of imperial power. Au-

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tonomy does not consist in the peculiar form in which laws come into being, but in the independent right to issue laws. Such a right presumes a subject to which it belongs. In the imperial territory such a subject is wanting.[1]

All laws for Alsace-Lorraine, therefore, were still imperial laws; but two methods were provided by which they might be enacted: the usual process of imperial legislation, which, up to the passage of the law of May 2, 1877, was the only method, and the new method set forth in section 1 of the law, already quoted. This latter method became the regular mode of legislating for the territory, while the ordinary process of imperial legislation through the usual organs shrank to a mere right reserved by the empire for exceptional use.[2]

The new mode of legislation deviated from the ordinary process of imperial legislation in several particulars. The consent of the Imperial Diet was no longer necessary even in matters pertaining to the territorial budget. In its place stood the Territorial Committee, a body elected out of the territory itself, thus giving Alsace-Lorraine a positive voice in territorial legislation. The organs of territorial legislation were now the emperor, the Federal Council and the Territorial Committee. Another deviation manifested itself in the rôle played by the emperor in territorial legislation. Prior to the law of May 2, 1877, in conformity with article 7 of the imperial constitution, and following the ordinary method of imperial legislation, the laws for Alsace-Lorraine were sanctioned by the Federal Council. Under the provisions of section 1 of the law of May 2, 1877, legislation did not proceed, as stipulated in article 5 of the constitution, from the Federal Council and Imperial Diet,

[1] Laband, vol. ii, p. 251.

[2] Haenel, Staatsrecht, p. 828, states the matter thus: "Alle *Reichsangelegenheiten* werden auch für Elsass-Lothringen durch diejenigen Organe, in denjenigen Formen und mit denjenigen Rechtswirkungen von Reichswegen geordnet und verwaltet, wie dies gemeingültig die Reichsverfassung vorschreibt. Dagegen die elsass-lothringischen *Landesangelegenheiten* werden von den Organen des Reiches in den besonderen Ordnungen, in den Formen und mit den Rechtswirkungen wahrgenommen, welche die Reichsgesetze oder das Partikularrecht für Elsass-Lothringen besonders vorschreiben."

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but from the emperor, with the consent of the Federal Council and the Territorial Committee. The territorial laws were sanctioned by the emperor just as they had been sanctioned by him under the law of June 9, 1871, while the Federal Council, no longer the law-giver proper, was reduced to the level of the Territorial Committee—a body whose consent was necessary to the issue of a law by the emperor, but whose resolutions the emperor was not bound to engross and publish.[1]

While the law of May 2, 1877, did not affect the administrative organization of the territory, certain changes which were taking place in the Imperial Chancery were making themselves felt in Alsace-Lorraine. The Imperial Chancery began, in 1873, to erect what had hitherto been mere "divisions" of one general office into separate "departments," each with a state secretary at its head.[2] On January 1, 1877, "division iii," which had been occupied with the affairs of Alsace-Lorraine, became a separate department, known as the "department for Alsace-Lorraine." At the same time "division iv" became the imperial department of justice. On March 17, 1878, a law was passed authorizing the imperial chancellor to appoint a substitute, or deputy, who might sign for him and assume other responsibilities imposed upon the chancellor by the imperial constitution or by law.[3] The heads of departments, moreover, were made competent to act as such deputies, each within the jurisdiction of the department of which he was chief. As a result of this law, a new instance was thrust in between the president and the imperial chancellor, so far as the administrative affairs of the territory were concerned. This complicated the position of the president not a little. "The three instances, which had been created under the laws of the territory and of

[1] Laband, vol. ii, p. 252: "Zwar unterscheidet die Fassung des § 1 die Zustimmung des Bundesrats von derjenigen des Landesausschusses durch eine verschiedene Art der Erwähnung; wirklich entscheidend aber ist allein der Satz, dass dem Kaiser das Placet der Landesgesetze zusteht und er nicht rechtlich verpflichtet ist, ein vom Bundesrate beschlossenes Gesetz auszufertigen und zu verkündigen." The publication of the laws takes place by means of a special *Gazette for Alsace-Lorraine*.

[2] See Law of June 27, 1873 (*RGBl.*, 1873, p. 161; *GBl. für Elsass-Lothringen* 1873, p. 131); Ordinance of Dec. 22, 1875 (*RGBl.*, 1875, p. 379).

[3] *RGBl.*, 1878, p. 7.

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the empire, had become five. Furthermore, the departments of administration and of justice were torn asunder and assigned to two entirely separate and distinct boards." [1]

V. In order to obviate the difficulties growing out of this state of affairs, a law was passed on July 4, 1879,[2] to go into effect on October 1, 1879, from which date is reckoned the fifth period in the development of the territorial organization—the system under which Alsace-Lorraine is governed at the present time. The changes made by this law were sweeping. The administration of the imperial territory was wholly revolutionized. It was entirely disassociated from the person of the imperial chancellor; the department of the Imperial Chancery for Alsace-Lorraine was abolished, and the seat of all the governmental organs of the territory was transferred to the territory itself. The office of president of the territory was likewise abolished. In order to carry on the functions of the department for Alsace-Lorraine, as well as those of the department of justice so far as they touched territorial matters, and in order to perform the duties which had been laid upon the president, a board was erected in Strassburg, under the name of "ministry for Alsace-Lorraine," with a secretary of state at its head.

In the place of the imperial chancellor and the territorial president, the law provided for a new official who should visibly embody in Alsace-Lorraine the sovereign authority of the empire. Section 1 of the law empowered the emperor to delegate the authority vested in himself, as representative (*Delegatar*) of the power of the state in Alsace-Lorraine, to an official to be known as the governor (*Statthalter*), whose appointment and dismissal were to be in the hands of the emperor, and whose residence should be in Strassburg. The scope of the authority to be thus delegated to the governor was to be fixed by an ordinance of the emperor.[3] All the powers and duties which had been conferred by law or ordinance upon the imperial

[1] *Laband*, vol. ii, p. 220. [2] *RGBl.*, 1879, p. 165; Triepel, p. 219.

[3] Compare the following ordinances: July 23, 1879 (*RGBl.*, 1879, p. 282); September 28, 1885 (*RGBl.*, 1885, p. 273); March 15, 1888 (*RGBl.*, 1888, p. 130); June 20, 1888 (*RGBl.*, 1888, p. 189); December 11, 1889 (*RGBl.*, 1889, p. 2); March 14, 1893 (*RGBl.*, 1893, p. 137); November 5, 1894 (*RGBl.*, 1894, p. 529).

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chancellor, in matters pertaining to Alsace-Lorraine, as well as the extraordinary powers assigned to the president by the law of December 30, 1871, were granted to the governor.[1] At the same time, the Territorial Committee was enlarged and its powers were increased. A Council of State, with advisory power, was added to the territorial organization, while the competence of the Federal Council was restricted by the transfer of certain functions heretofore exercised by that body to the new ministry.

The institutions of the imperial territory, as at present organized, are the following:

(1) *The emperor.* The state power in Alsace-Lorraine is vested in the empire. The exercise of that power is placed in the hands of the emperor. The legal title under which the emperor exercises this power is found in the law of June 9, 1871. The emperor is not the ruler or monarch of Alsace-Lorraine in the sense in which, for example, the king of Bavaria is monarch of Bavaria. Alsace-Lorraine is not an appurtenance of the imperial crown. Whatever authority is exercised by the emperor in the imperial territory is exercised in the name of the empire, never in his own name.[2] The territorial ruler (*Landesherr*) of Alsace-Lorraine is the empire. The emperor is simply the agent (*Delegatar*) of the empire.

(2) *The governor.* The legal title of the governor (*Statthalter*) rests upon the law of July 4, 1879, sections 1 and 2. He is appointed by the emperor and is also removable by him. The appointment is countersigned by the imperial chancellor,[3] as is also the ordinance transferring to him the powers of the emperor. The governor acts in two capacities:

(*a*) He is the personal representative of the emperor, when

[1] Law of July 4, 1879, Sec. 2. For the law of December 30, 1871, see *GBl. für Elsass-Lothringen*, 1872, p. 49. Sec. 10 of this law grants certain military powers to the president in case the public safety is threatened. This section was repealed by the law of June 18, 1902 (*RGBl.*, 1902, p. 281).

[2] Laband, vol. ii, pp. 221, 222; Meyer, *Staatsrecht*, p. 431, note 1; Stöber, *op. cit.*, pp. 660–658.

[3] While the transfer of the emperor's power to the governor is optional, the appointment of a governor is obligatory. *Cf.* Laband, vol. ii, pp. 229, *et seq.*

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the emperor sees fit to invest him with the powers he himself possesses in the imperial territory. The emperor is under no obligation to transfer his powers to the governor; the matter is purely optional with him. But when the governor has been once invested with the governmental powers of the emperor in Alsace-Lorraine, he becomes, until such time as these powers may be again resumed by the emperor, the vice-emperor. The powers thus transferred by the emperor attach to the person of the governor, not to the office. Hence, when the governor is hindered in the exercise of his imposed duties, these functions revert to the emperor. When acting as the representative of the emperor, the governor is not constitutionally responsible, nor does he stand in any disciplinary relation. He is, of course, responsible to the emperor for the proper discharge of his duties. The decrees and ordinances issued by the governor in his capacity as representative of the emperor, have the same force as imperial ordinances and decrees, and require for their validity the countersignature of the territorial secretary of state, who thereby assumes responsibility therefor.[1]

(*b*) The governor is also an official of the empire. He occupies that position in Alsace-Lorraine which was formerly held by the imperial chancellor and the president.[2] As an official of the empire, however, the governor is not a deputy of the imperial chancellor, within the meaning of the law respecting the appointment of deputies to the imperial chancellor.[3] As Laband explains:

> The governor takes the place of the imperial chancellor not as his delegate but as his successor. The competence of the imperial chancellor was divided into two spheres by the law of July 4, 1879; the competence in general affairs of the empire, and the competence in matters pertaining to the imperial territory. The latter has been taken away from the imperial chancellor and given to the governor. The theory of the imperial constitution, that there is but one imperial minister, has been changed by the law of 1879. Since then there have been two.

[1] Law of July 4, 1879, sec. 4, cl. 1.

[2] *Ibid.* sec. 2.

[3] Law of March 17, 1878, (*RGBl.*, 1878, p. 7.)

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The governor is the imperial chancellor for Alsace-Lorraine, just as the Territorial Committee is the Imperial Diet for Alsace-Lorraine.[1]

In so far as he acts in the capacity of an official of the empire, the governor is responsible. He is responsible, however, not to the Territorial Committee, but to the Imperial Diet—at least in theory. In practice, however, he would seem to be responsible to the Territorial Committee.

The governor has no relations whatever with the Imperial Diet, while the Territorial Committee, in fixing the budget, auditing the accounts, discussing measures, petitions, *etc.*, is in a position to criticize the action of the government, and only over against this body can the government justify its acts and establish its propositions.[2]

Theoretically, the governor should countersign the ordinances of the emperor touching territorial matters, *i. e.* those matters which, in the division of powers recognized in the imperial constitution, fall within the competence of the individual states.[3] Here also theory and practice fail to coincide. Laws affecting the territorial affairs of Alsace-Lorraine and passed (under the reservation contained in section 2, clause 1, of the law of May 2, 1877) by the legislative organs of the empire, are signed by the governor and by the imperial chancellor, the latter assuming the responsibility for the law and the supervision of its execution.[4] In all those matters in which the governor acts as an official of the empire, and as successor of the imperial chancellor, the territorial state secretary has the rights and responsibility of a deputy of the governor, to the same extent in which, under the law of March 17, 1878, such rights and responsibility are possessed by the deputy of the imperial chancellor. The right of the governor himself to perform any official function which falls within his sphere is reserved.[5]

[1] Laband, vol. ii, p. 229.

[2] *Ibid.* p. 231.

[3] Law of July 4, 1879, secs. 2 and 4. See also law of June 9, 1871, sec. 3, cl. 4, and law of May 2, 1877, secs. 1 and 2. Compare Laband, vol. ii, p. 230; Meyer, Staatsrecht, p. 432; Arndt, Staatsrecht, p. 754; Kayser, in Holtzendorff's Rechtslexikon, vol. iii, p. 405; Leoni, Das öffentliche Recht des Reichslandes Elsass-Lothringen, pp. 89, 167 *et seq.*

[4] See examples cited by Laband, vol. ii, p. 230, note 5.

[5] Law of July 4, 1879, sec. 4, cl. 2.

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(3) *The ministry*—no longer located in Berlin as a department of the Imperial Chancery, but, as already noted, transferred to Strassburg—still maintains the character of an imperial board, equally with the other imperial departments, such as the department of the interior or the department of justice; not, however, under the imperial chancellor, but under the governor. At the head of the ministry is a state secretary, who, as noted in the preceding paragraph, bears the same relation to the governor in certain matters as the deputy of the imperial chancellor bears to that official under the law of March 18, 1878. The ministry is grouped into several divisions, at the head of each of which is placed an under-secretary of state. Both the state secretary and the under-secretaries of state are appointed by the emperor. These appointments are countersigned by the governor, to whom is assigned the appointment of the other high ministerial officials.[1] The details of the organization of the ministry are fixed by ordinance of the emperor.[2] The powers and duties of the ministry include all those which formerly rested upon the Imperial Chancery department for Alsace-Lorraine, as well as those which belonged to the president prior to the passage of the law of July 4, 1879, together with such further competence as may have been granted since by territorial legislation.[3] Under the ministry stand the various administrative and judicial authorities of the territory, with the exception of those concerned with matters which, like the post and telegraph, imperial railroads and the imperial bank, belong to the competence of the empire, and military matters, which are administered by Prussia.[4]

(4) *Council of state.* By the provisions of section 9 of the law of July 4, 1879, a council of state was created, consisting of

[1] Law of July 4, 1879, sec. 6. The subordinate officials are appointed by the state secretary. As to the legal relations of these officials, see the law of July 4, 1879, sec. 6, cl. 3; also Laband, vol. ii, pp. 233 *et seq.*; Haenel, Staatsrecht, p. 831; Meyer, Staatsrecht, p. 440, note 4; Leoni, *op. cit.*, pp. 128 *et seq.*

[2] Law of July 4, 1879, sec. 5; ordinance of July 23, 1879 (*GBl. für Elsass-Lothringen*, 1879, p. 81), amended by ordinances of July 29, 1881 (*GBl.*, 1881, p. 95); April 21, 1882 (*GBl.*, 1882, p. 67); April 25, 1887 (*GBl.*, 1887, p. 43); Jan. 16, 1895 (*GBl.*, 1895, p. 3); April 2, 1902 (*GBl.*, 1902, p. 29).

[3] Law of July 4, 1879, sec. 3.

[4] See Leoni, Das Verfassungsrecht von Elsass-Lothringen (1892), pp. 92 *et seq.*

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the state secretary, the under-secretaries, the president of the supreme court of the territory, the chief attorney attached to the supreme court, and from eight to twelve members appointed by the emperor for a term of three years. Three of the members appointed by the emperor are nominated by the Territorial Committee. The meetings of the council of state are presided over by the governor or, in case he is prevented from acting, by the state secretary.[1]

The functions of the council of state are purely advisory, and in no sense legislative or judicial.[2] The council is called upon to give an opinion upon the drafts of all proposed laws and of general ordinances issued for the execution of those laws, as well as on matters which may be submitted to it by the governor. The law of July 4, 1879, requires that all laws and general ordinances, without exception, shall be laid before the council of state. Should this be neglected or omitted, however, the validity of the measure would be in no wise affected.[3] The council of state is not an innovation in the organization of Alsace-Lorraine. It is rather the revival of an institution long and favorably known there—the *conseil d' êtat* whose functions seemed specially needed in the peculiar conditions existing in Alsace-Lorraine.[4] The reasons for its revival were set forth in the "motives" to section 9 of the law of July 4, 1879:

> It will hardly be doubted that a comprehensive and thorough consideration of the propositions to be laid by the government before the legislative factors is better secured, if the preparation of those propositions is not left to the several ministerial departments alone, but is handed over for discussion to a body in which are combined a knowledge of law and of business, an insight into the needs of the territory, and an assured position in life, removed as far as possible from the struggles of political parties. The initiative and the preliminary draft would naturally fall, as a rule, to the minister of the department concerned, but the necessary scrutiny of the law to ascertain whether it would be useful and practicable, what reaction it might have upon the interests of the

[1] Law of July 4, 1879, sec. 10. The order of business is fixed by the emperor.

[2] Legislative and other special functions may, however, be granted to it by territorial legislation. Law of July 4, 1879, sec. 9.

[3] Leoni, *op. cit.* p. 96.

[4] *Ibid.* p. 95.

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territory administered by other departments, and, finally, whether the purpose of the law has reached its desired expression in the wording of the draft—this transcends the scope of the individual department.

(5) *The Federal Council* of the empire is an organ of legislation in Alsace-Lorraine. According to sections 1 and 2 of the law of May 2, 1877—sections which were not repealed by the law of July 4, 1879—laws for Alsace-Lorraine are issued by the emperor with the consent of the Federal Council, provided the consent of the Territorial Committee has been obtained to the desired measure, By special provision, however, the right is reserved to legislate for Alsace-Lorraine through the usual organs of imperial legislation. The laws of Alsace-Lorraine, then, as well as the laws of the empire, require for their validity the consent of the Federal Council. It must not be inferred, however, that the position of the Federal Council is the same in both cases. According to article 5 of the imperial constitution, the legislative power of the empire is exercised by the Federal Council and the Imperial Diet, and a majority in both bodies is necessary and sufficient. Such consent being had, the emperor is bound to engross and publish the law. The prevailing view is that the Federal Council is the imperial organ in which legislative power rests, from which the mandatory element in the law proceeds and to which the ordinance power is assigned. In strictly territorial legislation, on the contrary, the *placet* belongs to the emperor. It is he who, as holder of state power (*Träger der Staatsgewalt*) in Alsace-Lorraine, exercises the legislative power. Section 1 of the law of May 2, 1877, explicitly declares it. In territorial legislation, therefore, the Federal Council has no authority different from that possessed by the Territorial Committee. The required consent of the Federal Council in territorial legislation is a constitutional check upon the power of the emperor. The functions of the Federal Council are, in this case, those of a parliamentary body or upper house.[1]

[1] See Stenographic Reports of the Imperial Diet, 1879, vol. ii, p. 1631. It is in accord with this idea that the power to issue ordinances for the execution of the territorial laws belongs to the emperor and not to the Federal Council. So far as territorial laws are concerned, article 7, cl. 2 of the imperial constitution does not operate. Leoni, *op. cit.* p. 54.

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The coöperation of the Federal Council is necessary in the discharge of certain administrative business. The government is bound to lay before the Federal Council the accounts of the territorial budget.[1] The compulsory retirement of an official who has become incapacitated for the performance of his duties, by reasons of bodily infirmity or on account of mental or physical weakness, can be brought about, in the case of officials appointed by the emperor, by an order of the emperor, but only with the consent of the Federal Council.[2] Ordinances of the emperor touching the erection of disciplinary chambers and the delimitation of disciplinary districts are issued with the consent of the Federal Council. The Federal Council selects the members of the disciplinary chambers and the order of business in the disciplinary boards is subjected to its approval.[3]

(6) *The Territorial Committee* is a creation of imperial law, and so long as the empire reserves to itself the power to give a constitution to Alsace-Lorraine, an imperial law may wipe it out of existence. In this respect a sharp contrast is drawn between the Territorial Committee and the Diets (*Landtage*) of the several German states. A further difference is found in the fact that the powers usually exercised by the assemblies of the states are not exercised by the Territorial Committee alone or exclusively, but are granted also to the Imperial Diet by the reservation in the law of May 2, 1877, already referred to. As a result, the coöperation of the Territorial Committee in territorial legislation is not a necessary condition, but an optional one. On the other hand, the legal position of the Territorial Committee is not identical with that of a provincial assembly. It has, under the law, a full right of coöperation in legislation, where the reserved imperial right to legislate is not exercised, and in fixing the budget. It exercises all the rights which

[1] Law of May 2, 1877, sec. 3.

[2] Law of March 31, 1873, sec. 66. With respect to the other officials the governor decides the question of retirement, and from his decision an appeal may be taken to the Federal Council. See Leoni, *op. cit.* p. 54.

[3] Law of March 31, 1873, secs. 87, 91, 92, 93. See also law July 4, 1879, sec. 8. In appeals touching ecclesiastical matters (*Rekurse wegen Missbrauchs, etc.*) the Federal Council decides after investigation by its judicial committee. In this respect it takes the place of the French *Conseil d' État.* Law of December 31, 1871, sec. 9.

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usually appertain to the representative body in a constitutional state. The territory, however, is not a state, and for that reason it can have no state organs. The powers of the Territorial Committee are derived wholly from the empire, and its whole existence rests upon imperial law. It is therefore an organ of the empire, or, to use the words of Laband, it is a "special substitute *Reichstag*, which operates in the affairs of Alsace-Lorraine in place of the regular *Reichstag*." It does not represent a "people of Alsace-Lorraine," but the "German people of the Empire, so far as that people may be domiciled in Alsace-Lorraine and may be interested, for that reason, in the special affairs of the territory. In contrast with the *Reichstag* it is a special representative of the population of Alsace-Lorraine, but it is an organ of the empire just as the *Reichstag* is."[1]

The Territorial Committee is composed of 58 members, 34 of whom are elected by the district assemblies out of their own membership,[2] four are chosen in the same manner by the communal councils of the cities of Strassburg, Colmar, Metz and Mülhausen, one from each city,[3] and 20 are elected by indirect ballot from the various circles into which the territory is divided.[4] The term of office is three years. The emperor has the exclusive right to call, adjourn and dissolve the Territorial Committee.[5] The ministers or their representatives have a right to

[1] Laband, vol. ii, p. 225. A distinction is made here between "people" (*Volk*) and "population". (*Bevölkerung*). Jellinek, Staatsfragmente, p. 287, declares that the Territorial Committee is not an organ of the empire, but of the territory as a corporate body, which has itself received its organization through this very Territorial Committee. He further claims that the Committee, by reason of its share in the function of legislation, is not the organ of a provincial corporation but is a state organ.

[2] That is, 10 by the district assembly of Upper Alsace, 11 by the district assembly of Lower Alsace, and 13 by the district assembly of Lorraine. Should a member thus elected cease to be a member of the district assembly, his membership in the Committee ceases at the same time. Decree of Oct. 29, 1875, cl. 2.

[3] Each Communal Council elects from its own body, and membership in the Committee ceases with the loss of membership in the council.

[4] The city communes of Colmar and Mülhausen are excluded from voting in the election of members from the circles of Colmar and Mülhausen. Law of July 4, 1879, sec. 13.

[5] Law of July 4, 1879, sec. 19. The dissolution of the Committee carries with it

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be present during the transaction of business by the Committee, and must be heard at any time on their own request.[1] The general provisions of the imperial law protecting the members of representative bodies apply also to the members of the Territorial Committee.[2] The special provisions, however, which concern members of the Imperial Diet particularly, have no application.[3]

Having discussed briefly the organization of Alsace-Lorraine, a few words must be added respecting legislation in the territory. Laws may come into being in Alsace-Lorraine in any one of three ways: (1) by a decree of the emperor with the consent of the Federal Council and the Territorial Committee; (2) by a decree of the emperor with the consent of the Federal Council and the Imperial Diet; and, (3) by a decree of the emperor with the consent of the Federal Council, in the form of a provisional ordinance having the force of law. The first method is generally employed.

(1) In legislation on matters pertaining to Alsace-Lorraine, that is, in what may be termed territorial legislation, the right of initiative belongs not only to the goverment, but to the Federal Council and the Territorial Committee.[4] Before a bill is submitted to these legislative bodies, it is laid before the council of state for its expert opinion, and is then introduced into the Federal Council. From the Federal Council it passes to the Territorial Committee. The result of the deliberation in the Federal Council is communicated to the governor by the president of the Federal Council, while the action of the Territorial Committee is brought to the knowledge of the government by the president of the Committee. The government is not bound by

the dissolution of the district assemblies. A new election of assemblies must take place within three months and of the Committee within six months from the date of dissolution.

[1] Law of July 4, 1879, sec. 21.

[2] Law of August 30, 1871, art. 1. See Laband, vol. ii, p. 227; Leoni, *op. cit.*, p. 72; Meyer, Staatsrecht, p. 426, note 17.

[3] The members of the Committee may and do receive compensation. This is at present fixed at 20 marks *per diem* with mileage and is paid out of the territorial treasury.

[4] Law of July 4, 1879, sec. 21.

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the action of the Federal Council or Territorial Committee, but may withdraw the measure at any time. Nor is there any period fixed within which the government, after the Federal Council has acted upon a bill, must submit that bill to the Territorial Committee for its action or to the emperor for his sanction. Nothing stands legally in the way of holding bills which have been passed by the Federal Council before the beginning of the session of the Territorial Committee or during such session, and submitting them to the action of the Committee at a subsequent session.[1]

Both the Federal Council and the Territorial Committee may amend bills submitted to them. Should amendments be made in the Territorial Committee, no matter what the nature of the amendment may be or how seemingly unimportant, the bill must be returned to the Federal Council for its consent, since, as Leoni observes, "the activity of the Federal Council may not at any time be made contingent upon the views of the government as to the importance or unimportance of the amendments." When a bill is accepted by the Territorial Committee without alteration, a further action of the Federal Council is not necessary, as in imperial legislation, nor is it customary in territorial legislation.

The sanction of a law is imparted by the emperor, not, as in imperial legislation, by the Federal Council. In territorial legislation the Federal Council stands upon the same level with the Territorial Committee, possessing no authority which that body does not also possess. "It is not a lawgiver proper. Its consent is simply a condition to the issue of a law on the part of the emperor."[2] In deciding whether a bill shall become law, the emperor is perfectly free to exercise his own discretion. He is not in any sense bound by the majority vote of the Federal Council,[3] nor does the fact that the bill has passed both legislative bodies lay upon him any legal obligation whatever to

[1] Leoni, *op. cit.*, p. 162.

[2] Laband, vol. ii, p. 252; Leoni, *op. cit.*, p. 161.

[3] "The emperor may sanction a bill although the Prussian delegates in the Federal Council have voted against it and may refuse sanction although the Prussian votes in the Federal Council are in the affirmative." Leoni, *op. cit.*, p. 162.

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impart to that bill his sanction. Bills which have received the sanction of the emperor are engrossed by him (*ausgefertigt*), countersigned by the governor or by his deputy, the territorial state secretary and published in the *Gazette for Alsace-Lorraine*.

(2) In section 2 of the law of May 2, 1877, the right of passing laws for Alsace-Lorraine in the way of ordinary imperial legislation is specially reserved. Under the provisions of this law, a measure affecting territorial matters in Alsace-Lorraine may be passed by the Federal Council and the Imperial Diet with the coöperation of the emperor, with no reference whatever to the Territorial Committee. In such a case the bill might originate in the Imperial Diet as well as in the Federal Council, and it would not be submitted to the territorial council of state for its opinion. Moreover, bills passed in the form of ordinary imperial legislation, though the matters dealt with be purely territorial, do not lose thereby their character of imperial laws.[1] The fact that laws affecting the imperial territory may be passed in two different modes might well lead to serious complications. Moreover, delicate questions might arise as to the status of a measure which, voted down in the Territorial Committee, was thereupon introduced in the Imperial Diet by the Federal Council for adoption in the way of imperial legislation.

A question arises at this point as to the relation of laws passed in the form of territorial legislation to those passed in the form of imperial legislation. According to article 2 of the imperial constitution, imperial laws take precedence of state laws. The decisive fact is not the date of publication. The later law does not as such repeal the earlier. The principle is simply that an expression of will on the part of a higher power overrides an expression of will on the part of a subordinate power. In Alsace-Lorraine, however, there is but one state power—the power of the empire. Imperial laws for Alsace-Lorraine and territorial laws for Alsace-Lorraine passed in the way of imperial legisla-

[1] Laband, vol. ii. p. 251; Haenel, p. 828; Stöber, *op. cit.*, pp. 652 *et seq.* The statement of Leoni, *op. cit.*, p. 163: "The coöperation of the Imperial Diet in place of the Territorial Committee does not make the law an imperial law; it remains in every case a territorial law under the sanction of the emperor, where a matter not regulated by the imperial constitution or the territorial constitution forms the subject-matter," is a strained construction of sec. 2 of the law of May 2, 1877.

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tion are both expressions of the will of this one state power. Here, therefore, the principle would hold that the later law repealed the earlier. With respect to laws passed in the form of territorial legislation, in distinction from imperial legislation for Alsace-Lorraine or territorial laws passed in the way of imperial legislation, this principle does not apply, so far as the relation of such territorial legislation to imperial legislation is concerned. Laws passed in the form of territorial legislation, *i. e.* laws issued by the emperor with the consent of the Federal Council and the Territorial Committee, do not take precedence of earlier imperial laws touching the same subject, and can neither amend nor repeal them. For in section 2, clause 2, of the law of May 2, 1877, it is expressly declared that laws affecting territorial matters, passed in the way of imperial legislation, can be amended and repealed only through imperial legislation. This clause corresponds to the legal relation between the legislative factors in both forms of legislation. An imperial law for Alsace-Lorraine, a law touching matters purely territorial passed in the form of imperial law, issues, like every imperial law, from the Federal Council with the consent of the Imperial Diet. The sanction is imparted by the Federal Council. A law in Alsace-Lorraine, passed in the form of territorial legislation, issues from the emperor, the consent of the Federal Council and that of the Territorial Committee having been previously obtained. In the first case, the legislation for Alsace-Lorraine is immediate. In the second case it is mediate. That is to say, in the first instance we have an immediate expression of the will of the state power. In the second, we have a mediate expression of that will through the emperor, into whose hands the state power (with the reservation contained in section 2 of the law of May 2, 1877,) has been placed. The two forms of legislation, therefore, rest upon two distinct bases: the one upon original and the other upon derivative power. Where, as in this latter case, the delegated power is limited by an express reservation, the exercise of the reserved power by the imperial legislative body must take precedence of all action on the same subject by the holder of the delegated power.

(3) By the provisions of the law of June 25, 1873, section

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8,[1] the emperor is authorized, until such time as the matter may be regulated by imperial legislation, to issue, with the consent of the Federal Conncil, ordinances having the force of law.[2] In the exercise of this right, the emperor is subjected to certain limitations. In the first place, such ordinances may contain nothing contrary to the constitution or to the imperial laws in force in Alsace-Lorraine, nor may they relate to such matters as require, by the provisions of section 3, clause 2, of the law of June 9, 1871,[3] the consent of the Imperial Diet for their determination. In the third place, such ordinances must be laid before the Imperial Diet at its next meeting for its action. Should ratification be refused by the Imperial Diet, the ordinance goes out of force. The assent of the Imperial Diet on the other hand, raises the ordinance to the dignity of a law, which cannot be amended or repealed by subsequent ordinance, but by law only.[4] This power of issuing provisional ordinances having the force of law may be exercised only when the Imperial Diet is not in session. The fact that the Territorial Committee may be in session is irrelevant.[5]

. The law of July 7, 1887,[6] provides that where an imperial law has been introduced into Alsace-Lorraine, and such law is subsequently amended through imperial legislation, the amendment may be made effective in Alsace-Lorraine by an ordinance of the emperor, with the consent of the Federal Council, and the date from which such amendment shall go into force may be fixed in the ordinance. The power of the emperor to issue ordinances of this nature is not subjected to the provisions of section 8 of the law of June 25, 1873. These ordinances may be issued while the Imperial Diet is in session and need no subsequent ratification by that body. They are not in any sense provisional "ordinances with temporary legal force", but represent an exercise of delegated power of legislation.

BURT ESTES HOWARD.

LOS ANGELES, CALIFORNIA.

[1] *RGBl.* 1883, p. 161; *GBl. für Elsass-Lothringen*, 1873, p. 131.

[2] "Verordnungen mit interimistischer Gesetzeskraft."

[3] Matters involving the assumption of loans or guarantees for Alsace-Lorraine, through which a burden is laid upon the empire.

[4] Compare Leoni, *op. cit.*, p. 164; Laband, vol. ii, p. 257.

[5] See in this connection the Stenographic Reports of the Imperial Diet 1877, vol. i, p. 281; And *cf.* remarks of Laband, vol. ii, p. 257.

[6] *RGBl.* 1887, p. 377.

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THE REFORM OF PROCEDURE IN THE FRENCH CHAMBER OF DEPUTIES

THE reform of procedure recently begun in the French Chamber is not immediately important, but suggests significant developments. Originating in the legislative incapacity of the Chamber, the early attempts at reform were leveled at the peculiarly inefficient committee system and at recognized abuses of the individual initiative. The failure of the first great effort demonstrated the difficulty of the question and made evident the necessity of proceeding more slowly. The committee system was reformed and the individual initiative limited in budget amendments, but the deputy was allowed to retain much of his old time importance. This rendered the reforms ineffective. But the necessity of limiting the discussion of interpellations resulted in ministerial control and a limitation of the individual initiative which will make effective reforms possible.

I. *Legislative incapacity and beginnings of reform*

The rules of procedure adopted in 1876 by the newly created legislative chamber were based upon the rules used by the Assembly of 1848. Technically all connection with the Chambers of Louis Napoleon and Louis Philippe was avoided, but the break with the past was more apparent than real. The republic of 1848 was moribund at its foundation; its Legislative Assembly was the weakest branch of the government and never enjoyed much authority. The rules of this Assembly were the embodiment of the parliamentary experience gained under Louis Philippe, but the spirit of '48 gave them a decidedly republican tone. The monarchy of July gave the present republic not only its body of rules but has also furnished the most notable precedents for the interpretation of these rules.[1] The

[1] Poudra et Pierre, Traité de Droit Parlementaire (Paris 1879), *passim*.

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reference to the republic of 1848 serves merely to obscure the origin of the rules.

The present Chamber of Deputies, thus equipped with the rules of the Chamber of Louis Philippe, was designed to occupy a very different place in the government. The ministers of Louis Philippe were independent of the Chamber; legislation was prepared outside of the Chamber and submitted for an approval which was little more than a form. The Chamber was expected to confine itself to discussion and criticism. It was designed to be inefficient. Under the republic the Chamber was to occupy a more important position. The ministers were to be really responsible to it. Legislation was to be prepared by the Chamber itself. For such a body the rules of the monarchy of July were manifestly inadequate.

Reforms in the rules were proposed in 1882, 1885, 1889 and 1893. Each new legislature added strength to the group of reformers, and finally in 1898 many candidates were obliged to pledge themselves to a reform of procedure. The constituencies had been brought to a keen appreciation of the need of reform. The political journals kept up the agitation, and one or two articles appeared in the reviews. As soon as the legislature assembled numerous projects for the reform of the rules were submitted by individual deputies. A committee was appointed to examine the plans submitted and to draft a comprehensive measure.[1]

Whatever rule any individual reformer proposed to alter, all were seeking the same end. The people desired to have a legislature that could produce good legislation. Civilians complained of the lack of it upon many important subjects; administrators were constantly hampered by the obscurity of the text of the laws sent them from Paris; financiers criticised severely the repeated deficits.

The unhappy situation depicted in the complaints of the reformers may be traced to the organization of the Chamber,

[1] Chambre des Députés, Documents Parlementaires, 1898-99, p. 1492. The Parliamentary Documents and Debates are published in two forms: as part of the *Journal Officiel*, and in the Annales Parlementaires. Both publications are printed from the same plates.

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which was defective in the impossibility of effective control by responsible leaders, growing out of the complete supremacy of the individual deputy. The French parliamentary writers recognize this, but they feel that these principles are their great contribution to parliamentary thought. "The object of the rules," says M. Pierre, "is not to present theorists with an attractive code of procedure; the rules are designed to guarantee complete freedom to all opinions and to all members."[1] Even the reformers do not criticise the principle, although they desire to prune away certain "abuses" of individual initiative.[2] The strong, independent government of Louis Philippe, the democratic spirit of '48, enable us to understand the attitude of the Frenchman towards the individual deputy. The impotence of the legislature at that time concealed thoroughly the evils which have since appeared from the application to a legislature of rules suited for a debating society. But adherence to the past can now be purchased only at the price of continued legislative impotence, which conditions no longer necessitate nor permit.

As party organization and ministerial influence was feared, the arrangement of business was left to the Chamber as a whole. The ministry was given no right to control the time of the Chamber in any respect, nor was any one else made responsible for a systematic arrangement of business. The ministry proposed its measures, the deputies brought in project after project, but no order of the day was arranged for any considerable period. At the close of each sitting the order of business for the following day was prepared: sometimes a committee demanded time for its report, more often there was no formal motion but merely shouts from groups of deputies. The order of business prepared in this haphazard manner was hedged about with few securities. A bill might be brought up the next day under the urgency motion, or an interpellation might be discussed to the exclusion of all or a part of the business set down the night before for discussion. In the spring of

[1] E. Pierre, La Procédure, Paris, 1887. Cited, C. D. Doc. Parl., 1898-99, p. 1492.

[2] C. D. Doc. Parl., 1898-99, p. 1520.

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1902, for instance, the debate on the budget was held up for three hours by a debate upon an urgency motion, although the Chamber had been assembled in an extra sitting for the express purpose of getting on with the budget.[1] This lack of organization was perhaps of little moment during the reign of Louis Philippe, but under the republic it was fatal.

The endeavor to avoid ministerial influence under the monarchy of July had produced also an elaborate method of choosing the special committees to which each bill was sent for consideration. The system worked well enough as long as the avoidance of such influence was alone necessary, but the clumsiness of the system became apparent at once when the legislature of the republic endeavored to prepare legislation in these committees. A suggestive illustration is to be found in the history of the committee which prepared the project for the reform of the rules of 1898. The committee had been chosen in the usual manner, three members from each of the eleven bureaux, but it was not a very representative body, as the bureaux had for the most part elected the deputies who were interested in reform, so that the committee was on the whole more favorable to reform than the Chamber. The committee worked hard, studying English and congressional procedure, examining and weighing the numerous schemes which had been sent in by the deputies, studying the history of the rules called in question and the various amendments suggested in the past. But all this labor was practically wasted, because the committee did not represent the majority in the Chamber. Two or three preliminary articles of secondary importance were passed, but the first important article of their project was rejected. An amendment which was practically a new article was adopted by a vote of 281 to 229.[2] The question was recommitted, but the committee decided to drop the project of reform. The budget always has such an experience. The proposals of the ministers receive scant attention from the committee on the budget, which produces an entirely different scheme; then the report of the

[1] Cited, C. D. Débats Parl., Dec. 1, 1902, p. 551.

[2] *Ibid.* Nov. 15, 1898; Doc. Parl., 1898–9, sess. extra., p. 303.

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committee is made over by amendments in the Chamber. Two budgets are thus elaborately prepared to be thrown away and the final budget is the result of haphazard amendments made in the Chamber by irresponsible individual members. The time and effort wasted in the Chamber is beyond calculation.

Intelligent legislation is made difficult by the absence of responsible persons charged with the direction of business. Many bills pass because there is no systematic opposition. If no prejudices are aroused almost any bill can be passed, for the time of the Chamber is at the command of the individual deputy, and indifference makes it possible to secure the necessary votes. Opposition left to individual deputies becomes spasmodic. The fate of a reform proposed June 16, 1903, illustrates admirably the lack of systematic opposition. The partial suppression of the urgency motion was before the Chamber. Several members had examined the scheme of the committee and intended to oppose the first section of the proposal. But they did not follow the debate carefully and the section was passed before they realized what was being done. One of them rose to speak in opposition to the article that had just been passed, only to be politely informed by the president that the next article was then before the Chamber. A few moments later, improving the opportunity offered by an amendment to the other article of the committee, another member of the hostile group moved the recommitment of the whole scheme. He said that he and his friends could not accept "the vote upon article 34, which though perhaps not an unfair surprise, had taken place in the midst of great confusion. There is no doubt that we vote daily upon questions which we do not hear. Too often confused debates do not give us a clear understanding of the question at issue." The motion was carried and the reform of urgency postponed.[1]

The principle of individual initiative was also responsible for much useless consumption of time by deputies who secured the floor to propose some pet scheme or to bring to the attention of the ministry some unimportant incident which had affected

[1] C. D. Débats Parl., June 16, 1903, p. 411.

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their constituents or shocked their own sensibilities. The idea that the individual deputy should be given every opportunity to propose legislation and voice grievances had made it essential to afford him every facility for securing the attention of the house. The deputy was convinced that it was his duty to take advantage of these opportunities.

> Every deputy has the right to enter the tribune at the beginning or in the course of a sitting, to deposit a bill or resolution, to read an exposition of his motives in making the proposition and to invite the Chamber to declare urgency. I admit that in practice this privilege has been abused. Whenever we have an idea for a bill, as the result of our work or our imagination, we willingly suppose that the country could not exist if our bill is not passed immediately.[1]

Deputies thus impressed with their obligations to their constituents were able to make the Chamber thoroughly inefficient as a legislative body.

The extensive rights given the individual deputy made the group system possible. As each deputy had in his own right all the privileges of the Chamber, he did not need the support of a closely organized party to present his views to the Chamber. The rights of the individual had been guaranteed with the express purpose of protecting the deputy from the tyranny of party. No man was to be obliged to swallow some of his convictions in order to give the country the benefit of his talents. All were to participate freely in the labor of preparing legislation. Deputies holding similar views upon great questions might properly sit together and organize as a group with a staff of elected officers. But even when in the majority the deputy must act by right of his general privileges as member of the Chamber and not by virtue of any privileges conferred upon him as member of a party. The group could thus offer to non-members no inducements beyond fellowship with similarly minded men and could exert no control over members, because each as an independent could enjoy privileges as great as were in the possession of any other member of the Chamber.

The reformers faced a system which really needed to be

[1] C. D. Débats Parl., June 16, 1903, p. 407.

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entirely remodeled. But they had no such intention, feeling that all would be well if more time could be secured for legislative work. The substitution of standing committees on specified classes of legislation for special committees on each bill would make legislation more consistent and save much time. Many bills could be saved by securing a more systematic arrangement of business. The financial disorder could be remedied by restricting the right of individual members to propose amendments to the budget. More time for legislation could also be secured by preventing deputies from getting the tribune under cover of the urgency motion. Interpellations might be limited to one day per week. None of these changes, said the reformers, need disturb the great principle of individual initiative, but the abuses of a sound principle must be removed.

II. *The comprehensive scheme of the committee of 1898*

The abuse of individual initiative foremost in the minds of the reformers was connected with the urgency motion. This motion was primarily intended for use on such extraordinary occasions as required immediate legislation. The deputy proposing legislation of this character was permitted to mount the tribune to explain briefly the purport of his bill and the necessity for urgency. If the motion was passed, one of the readings of the bill was omitted and the committee stage governed by special rules designed to accelerate the work. But this extraordinary procedure was soon applied to nearly all measures brought before the house. In the preliminary stage of the process was discovered a most admirable opportunity of getting the tribune for any matter relevant or irrelevant. These unexpected developments made the status of the urgency motion peculiar, and the reformers felt that it might properly be subjected to drastic reform, as it had conferred upon the deputy powers which no one had intended to give him. The members who made most frequent use of the motion, however, declared that it was the bulwark of the liberty of the individual deputy.

The committee of 1898 proposed to meet the peculiar situation in the most logical way. The urgency procedure, which had been so regularly applied to all measures, should be made

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the ordinary procedure. The second reading was abolished except when demanded for a law whose importance warranted the additional formality. As this procedure no longer needed the preliminary explanation from the tribune, the individual deputy, would, in the future, be unable to abuse the patience of members with his passionate harangues upon subjects in which the Chamber felt no interest.[1]

But in other matters the reformers were more conservative, as they were anxious to "respect the absolute independence of the deputy." Yet the complaints of obscure and contradictory texts and of confused budgets, which were all directed against the freedom of amendment enjoyed by the individual deputies, obliged the committee to devise restrictions upon the individual initiative. The plan of the committee in regard to the amendment of ordinary laws is singularly obscure and inconsistent with the professions of the report. The committee speaks of the evils of having amendments voted before they are printed and distributed, commenting upon a case in which a written amendment was passed up to the president, circulated between the minister and the reporter of the committee and adopted straightway, though no one else had any idea of its contents. The ordinary procedure upon amendments was indeed made more strict, but the irregular proceeding so severely criticised in the report was to be permitted as an extraordinary procedure. The ordinary procedure proposed by the committee required that every amendment submitted to the Chamber should be printed and distributed two days at least before the discussion of the article to which it referred, and that no amendment should be brought before the Chamber unless it had been accepted by the committee charged with the bill.[2]

Even in regard to the budget the private member received altogether more consideration than he deserved. Amendments to a section of the budget were to be deposited before the beginning of the debate upon that section. Amendments increasing expenses or decreasing receipts must be accepted by a vote of the Chamber. The amendments received were to be sent to

[1] C. D. Doc. Parl., 1898-9, p. 1504-5.

[2] *Ibid.* p. 1526.

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the committee and embodied in a comprehensive report upon amendments, which should be submitted to the Chamber before the final vote upon the budget. No division lists for votes on the budget were to be published, lest the deputies should be impelled to vote for injudicious expenditure desired by their constituents.[1]

Interpellations also consumed much time which might be more advantageously used for the consideration of bills. The committee proposed to limit interpellations to one day per week.[2]

The reform of the actual legislative machinery really required not only the limitation of the old principle of individual initiative but the adoption in some degree at least of a new principle, the regulation and control of business by responsible persons. The issue was most clearly presented in regard to the regulation of the order of the day. No one, however, was prepared for an innovation. The necessity for a more systematic arrangement of business was perceived, but the English solution of the problem did not commend itself to the committee. They hoped to improve the order of the day by having it prepared for a week, instead of for a single day. This should take place at the last sitting of the week and, once prepared, should be changed only upon the motion of the ministers or forty members known to be present in the Chamber.[3]

In the plan of the committee for the organization of the standing committees as a regular part of parliamentary machinery, the old desire to protect and exalt the private member is more apparent than ever. The method of choosing the committees was the most difficult matter to settle, as great questions of principle were involved. Election by the Chamber as a whole would in the end make the committees reflect the opinions of the majority; the choice of committees by the bureaux would preserve the excessive rights of individual deputies which had been responsible for the unfortunate working of the old system. At this time the first alternative received scant consideration and the committee spent most of its time deciding how

[1] C. D. Doc. Parl., 1898-99, p. 1526. [2] *Ibid.* p. 1526–7. [3] *Ibid.* p. 1519.

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the privileges of the individual deputy might best be preserved. MM. Lanessan and H. Maret proposed to allow each deputy to choose his committee for himself. It was admitted that this would be difficult to apply, because some committees aroused more interest than others and would infallibly attract more than their share of members. The committee, however, declared that these practical difficulties should not be taken too seriously. "In examining the working of these systems, voluntary enrolment upon a register and election by the bureaux, we arrive at the conclusion that the second system is the more liberal, because it offers most security for the rights of minorities."[1]

The term of the committees was finally settled by an appeal to the same principle. A four-year term received little support, as it would be likely to deprive the younger deputies of influence. Entering the Chamber without experience, they would find it difficult to secure a good committee, and if the committees were appointed for four years they could not easily secure a more influential position. Deputies chosen in bye elections, too, would not be able to get a place upon any committee.[2] There were to be eleven committees of thirty-three members each.[3]

The measure of reform proposed by the committee was too moderate to overcome the defects which really existed. But even this measure was in advance of the sentiment of the Chamber. The initial defeat came upon one of the most moderate clauses in the article on standing committees. The clause limiting membership in the new committees to thirty-three was criticised as an invasion of the rights of the individual deputy, and an amendment providing for the distribution of all the members of the Chamber among the committees was adopted by a vote of 281 to 229.[4] The article was recommitted, but the committee ultimately decided to drop the question of reform,

[1] C. D. Doc. Parl., 1898-9, p. 1497. [2] *Ibid.*

[3] The committees were: Civil and Criminal Legislation; Departmental and Communal Administration: Public Instruction and the Fine Arts; Army; Navy; Labor; Insurance and Rural Aid Societies; Railroads; Tariff; Agriculture; Commerce and Industry.

[4] C. D. Débats Parl., Nov. 15, 1898.

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not preparing a report on this article nor bringing the rest of its scheme before the Chamber. The comprehensive measure was a complete failure.

III. *The reform of standing committees*

The reform movement was not, however, doomed to failure, simply because the scheme of the committee had been dropped. Attempts to reform particular abuses had already been made, and the comprehensive plan was abandoned largely because the complexity of the situation rendered it advisable to deal with one difficulty at a time. A reform of the committee system had already made some progress. A standing committee on the army had been appointed March 28, 1882, charged with all propositions concerning the numbers, equipment and inferior officers. Opposition to this committee was at first very bitter. Dangers of every description were predicted. But a committee on the tariff was appointed January 20, 1890, without arousing much hostility. Finally, in the sixth legislature of the republic (1894–8), standing committees were recognized as a useful parliamentary device. Ten committees, composed of thirty-three members, were nominated in the bureaux at various times.[1]

Standing committees did most of the work in the legislature which assembled in 1898, there being sixteen such committees in service in the course of that legislature and only seventy-one special committees. Of 1356 projects submitted to committees 1219 were considered by standing committees and only 137 by special committees.[2] The meetings of the standing committees were thinly attended. Ordinarily only eight or ten members were present.[3] Many members were inclined to declare that

[1] The Committees were: Judicial Reform; Tariff; Labor; Insurance and Aid Societies; Army; Navy; Railroads; Accounts and previous Budgets; General Reform of Taxation; Colonies. C. D. Doc. Parl., 1898–9, pp. 1496–7.

[2] C. D. Doc. Parl., Oct.–Dec., 1902, p. 270. Committees were: Tariff, June 23, 1898; Labor, Insurance and Aid Societies, Agriculture, Railroads, June 27, 1898; Judicial Reform, Civil Legislation, July 4, 1898; Army, Navy, Colonies, Nov. 11, 1898; Departmental Administration and Decentralization, Dec. 12, 1898; Commerce and Industry, Criminal Legislation, Fiscal Legislation, Dec. 13, 1898; Public Health, Jan. 16, 1900.

[3] C. D. Débats Parl., Nov. 17, 1902, p. 343.

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the committees were a failure, but most deputies were willing to admit that the standing committees did better work than the special committees. The principle had been accepted but the details had still to be worked out.

When the eighth legislature assembled in the fall of 1902 the constitution of the standing committees became a pressing issue. The Chamber was unwilling to create special committees and yet seemed at first unable to agree upon the constitution of the necessary standing committees. Projects were frequently laid aside to be committed to a standing committee which was to be appointed later. But this could not continue indefinitely. In October and November the Chamber had scarcely enough legislative material to keep the order of the day full. More than once the president was obliged to announce at four in the afternoon that there was no more business ready to come before the Chamber. A Monday sitting was omitted because there was nothing to do.[1]

The constitution of the standing committees was taken up November 17. The scheme laid before the Chamber provided for the organization of fifteen standing committees, among which all the deputies should be divided. A deputy acquired membership by filing a nomination paper signed by fifteen fellow deputies. A committee should be organized for business by the president of the Chamber as soon as twenty members were enrolled. If more nomination papers were filed for a committee than were necessary to give the committee its full quota, the candidates were to be selected according to the date of their nomination papers. No deputy was to belong to more than one standing committee.[2]

The project of the committee did not meet the wishes of the Chamber and was speedily made over by amendments. The provision for the constitution of committees by nomination papers was lost by a vote of 412 to 149. Defeated upon its own proposition, the committee gave its support to a clause providing for the election of committees in the Chamber by a

[1] C. D. Doc. Parl., 1902, sess. extra., p. 269.

[2] C. D. Débats Parl., Nov. 17, 1902, p. 337.

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general ticket. This plan, together with a compromise scheme providing for the election of some committees and the appointment of others in the bureaux, was defeated by the conservative deputies. The Chamber finally decided to appoint the committees in the bureaux, while the deputies in favor of election were appeased by the specific application of article 17 of the règlement to the new standing committees. This will make it possible to elect any particular committee by *scrutin de liste*, and although this has not yet been done, it may be the means of gradually getting rid of the bureaux. The other articles of the project of the committee were not opposed, though there were some changes in the list of committees.[1]

The provision that a deputy should belong to only one committee was found to be impracticable and was never really observed. An amendment was passed in January permitting a deputy to serve on not more than four standing committees. If a deputy ineligible on account of this rule is chosen for a fifth committee the president of the Chamber shall allow him a week in which to designate the committees to which he desires to belong. If he indicates no preference, the last election is declared null.[2] In June, 1903, the rules for the organization of the committees were amended.[3]

The change in the committee system has unquestionably produced good results, but it has not solved the problem which

[1] The final list of committees was: Tariff; Labor; Insurance and Aid Societies; Agriculture; Public Works, Railroads and Means of Communication; Judicial Reform, Civil and Criminal Legislation; Army; Navy; Foreign Affairs, Protectorates and Colonies; Education and the Fine Arts; Administration, general, departmental, communal; Worship and Decentralization; Commerce and Industry; Fiscal Legislation; Public Health; Posts and Telegraphs; Economical Reform. C. D. Débats Parl., Nov. 17, *passim*.

[2] C. D. Débats Parl., Jan. 15, 1903, p. 47.

[3] Art. 25 of the règlement was amended to read: "The committees shall be assembled without delay to elect their staff of officers. They shall also elect by a similar process the reporters charged to render account of the work of the committee. Every standing committee shall deposit upon the table of the Chamber at the beginning of each session a summarized account of its work. Every project sent to a committee shall be reported within six months of the day it was received. If this is not done, the author of the project may demand that it shall be placed on the order of the day. C. D. Débats Parl., June 16, 1903, p. 413.

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the reformers have been trying to meet. Other phases of parliamentary procedure must be reformed before the committees can be completely organized. They are still entirely independent of each other, and there is only the remotest possibility that they will be in harmony with the majority in the Chamber, although they will not perhaps be quite such radical bodies as were the special committees. The bureaux will now have to elect members to consider certain classes of legislation, not to discuss specified bills. The task of selection will not be as simple as it was, for the deputies will not have such clearly defined interests. Formerly, those members of the bureau who were interested in the bill were selected for the committee. Deputies with radical views on the subject were generally most interested in the bill, and the committee when finally assembled was likely to be more radical than the Chamber. The old method of selection will gradually be abandoned; the bureaux will pay more attention to party and less to personal interests. The committees will be more permanent and will make more of an effort to work in sympathy with the majority in the Chamber. But however important these changes may be, the Chamber cannot be properly organized until more limitations have been imposed upon the individual initiative.

III. *Limitation of the individual initiative*

The necessity of such limitation was clearly perceived by the committee of 1898. They did not wish to abandon the principle but agreed that it would be well to remove abuses. "It is impossible," said the committee,

> to find a more marked contrast between two institutions than that presented by the House of Commons and the Chamber of Deputies in the individual initiative of the latter and the ministerial initiative of the former. . . . Even if there are abuses of the ministerial initiative in England we must nevertheless suppress the abuses of the individual initiative, which are only too manifest in our own Chamber.[1]

The wide-spread desire for legislation creates public opinion

[1] C. D. Doc. Parl., 1898–9, p. 1520.

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upon the subject. The journals take to task the deputies who delay legislation by abusing the time of the Chamber and prevent the despatch of business by meddling incessantly with the order of the day. M. Méline is praised for his systematic arrangement of business and his successful efforts to prevent deputies from wasting the time of the Chamber.[1] The public is beginning to lose patience with the deputy, transferring their sympathies to the ministers. It is perhaps no more than a tendency as yet, but it is highly important, for when the idea that the Chamber ought to be "run" by the ministers and the majority has gained acceptance, an adequate limitation of the individual initiative will be possible.

In the Chamber the movement is directed against the urgency motion, the right of the deputies to amend the budget and unlimited discussion of interpellations. The reformers intend to do no more than limit these abuses, but their opponents rightly fear that the principle will ultimately be abandoned.

The committee of 1898 proposed to abolish urgency procedure but their plan failed and nothing more was done at that time. In 1902, in the new legislature, the subject was revived. M. Paul Meunier proposed (Nov. 28) that demands for urgency procedure should be allowed only upon Thursday, when they should follow the presentation of a bill.[2] The proposition of M. Lebrun is more significant. If urgency is demanded by the ministry the Chamber shall decide at once whether it shall be granted. If urgency is demanded for a proposition of a private member the demand must be placed in the hands of the president at the beginning of the sitting. The president announces the demand to the Chamber, but the vote is postponed until the close of the sitting.[3] The deputy has no opportunity to waste the time of the Chamber with a long speech. M. Fabien-Cesbron would have the Chamber permit the immediate discussion of a proposition only upon the request of the ministry.[4] Similar schemes were proposed by others.[5]

[1] C. D. Doc. Parl., 1898–9, p. 1519.

[2] *Ibid.* 1902, sess. extra., p. 413.

[3] C. D. Débats Parl., Dec. 1, 1902, p. 551.

[4] *Ibid.* p. 552.

[5] C. D. Doc. Parl., 1902, sess. extra., p. 456.

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These various propositions were duly committed and a scheme was reported June 16, 1903. In addition to the reform of urgency the committee proposed to amend the procedure upon resolutions and motions, cutting out an opportunity for a speech that was frequently used. For the reform of urgency, the plan of M. Lebrun was in the main adopted.[1]

The debate upon these resolutions is notable for the clearness with which the issue is stated by M. Gauthier de Clangy. He recognized that the rights of the individual deputy were seriously threatened and that the motion amounted to an abolition of urgency. The reporter of the committee made a great effort to show that it had sought only to cut away abuses. Urgency had been used so constantly in the passage of bills that the committee had endeavored to retain that element of the procedure, although they desired to prevent the use of urgency for reading motions which no one heard and for discussions which no one listened to. But when the debate had reached this point a misunderstanding became apparent which wrecked the entire project. The article upon resolutions and motions had been passed without debate, through the carelessness of the deputies who intended to oppose it. They now discovered their oversight. Unable to gain satisfaction in any other way, they utilized the opportunity presented by an amendment of the article on urgency and moved the recommitment of the whole report. The motion was carried by a considerable majority (299 to 259).[2] The committee did not report again and the question is not likely to be revived until the next legislature.

The disastrous effects of individual initiative were most clearly seen in the remodelling of the budget. The real cause of this extensive change by amendments lay in the fact that the budget committee was more or less out of sympathy with the majority, because the selection of the committee by the bureaux gave the majority no assured control of the committee. The ease with which amendments could be made by members in their individual capacity enabled the majority to recast the budget to suit itself,

[1] C. D. Débats Parl., June 16, 1903, p. 406. [2] *Ibid.* p. 411.

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so that little objection was made to the selection of the committee in the bureaux. But the remodelling in the Chamber was fatal to the balance and proportion of the budget, as the freedom of amendment not only enabled the majority to recast sections but also exposed the budget to the whims of individual deputies.

The committee of 1898 had proposed to limit the rights of the individual deputy in regard to such amendments. After their scheme was abandoned nothing was done for a year or more. The subject was finally revived by MM. Rouvier and Berthelot. Their proposals were moderate and were accepted by the Chamber.

No amendment to the budget nor any additional article tending to increase expenditure may be deposited after the three sittings which follow the distribution of the report on the chapter concerned. No proposition tending to increase salaries, indemnities, pensions or to create new offices or pensions or to extend them beyond their present limits may be made in the form of an amendment or additional article to the budget.[1]

Proposals of two sorts have been made to modify these new clauses: some designed to extend the principle of limitation of amendments to clauses decreasing or transferring expenditure from one purpose to another; others permitting any amendments which contain provisions for meeting any increased expenditure called for, or for procuring revenue equivalent to that raised by the taxes whose abolition is proposed.[1] But none of these schemes have received much attention and further reform in regard to budget amendments is not immediately necessary.

The interpellation represents the old procedure in its entirety, deriving importance from the legislative impotence of the Chamber and showing most clearly the power of the individual deputy. At any time, during any session, the deputy could interpellate the ministers, and he must be allowed to "develop his interpellation" within a month, unless it concerned foreign relations. Every phase of administration was examined through

[1] C. D. Doc. Parl., 1902, sess. ord., ii, 575; *ibid.* sess. extra., 511; *ibid.* sess. ord., i, 305; *ibid.* sess. ord., ii. 568.

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these interpellations, which were customarily given the right of way over almost everything else. The critical function thus displayed was the one thing for which the old procedure was adapted. It was the only phase of parliamentary life which the French politicians really understood, and was the only thing which the Chamber did thoroughly. Any change in the use of the interpellation is thus likely to be of great significance, as it involves a reform of the most important part of the old superstructure, the bulwark of the liberty of the individual deputy.

The extent to which the interpellation was the embodiment of the old procedure exposed it to attack at once. The early part of the attack goes hand in hand with the endeavor to build up the new system of standing committees, and though the movements are separate the connection is intimate, as the change in the old procedure must make considerable progress before the new committee system can be effectively organized.

The limitation of interpellations to one day per week was first proposed by M. Flandrin in 1894. He suggested that legislative work should be taken up Mondays, Tuesdays and Saturdays and that interpellations should be discussed only upon Thursdays.[1] The main object here was not so much to limit the right of interpellation as to obtain more time for legislative work. The standing committees were then being organized one at a time, and it was considered necessary to secure more time for the consideration of legislative projects.

The discussion of interpellations was indirectly limited in March, 1897, by a proposition moved by M. Marty which provided that Mondays, Tuesdays and Thursdays should be exclusively devoted to the discussion and passage of laws. This resolution was carried despite some vigorous opposition[2] and other resolutions were subsequently passed reserving Friday for the discussion of labor laws and Saturday for interpellations.[3] But these were merely sessional orders and were not placed in the règlement, so that the rule lapsed in July, 1898, when the sixth legislature disbanded.

[1] Cited by Gauthier de Clangy, March 18, 1904. C. D. Débats Parl., i, 1003. I have been unable to find the original record, as the Débats and Documents are not indexed until 1897.

[2] C. D. Débats Parl., March 13, 1897, p. 741. [3] *Ibid.* June 24, 1897, p. 1651.

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The comprehensive scheme of reform provided for the limitation of interpellations to Fridays, but when the scheme was dropped nothing was done for some time. Yet there was a tendency to establish the Friday rule as a custom in the regular session of 1899. In January and May, Fridays were used for interpellations and there were traces of such a rule in February, but nothing of the kind appeared in the extra session of 1899.[1] A resolution of M. Salis, May 31, 1900, reserving Friday for interpellations, was passed.[2] In some respects this seems to be an amendment of the règlement, but when the Chamber assembled in the fall for the extra session, Waldeck-Rousseau treated the matter as if it were still an open question. He proposed that some sitting should be set apart for interpellations, and after a very confused debate the Chamber agreed to devote Friday afternoons to them.[3] This vote was admitted to be no amendment of the règlement, but there has been no other vote since that time. The rule has not been observed very scrupulously, as the ministry or budget committee do not hesitate to use the day. Nevertheless the Friday rule seems to be accepted as a custom. The rule has resulted in one illegal practice, the postponement of the discussion of interpellations for more than one month. This article of the règlement remained a dead letter without even evoking protest until March 18, 1904, when M. Gauthier de Clangy made a vigorous speech denouncing its non-observance. He carried a resolution inviting the officers of the Chamber to enforce the one-month rule. The president of the Chamber extended his support to the motion, but the resolution seems to have had no effect.[4]

The main object in limiting interpellations to Friday was to secure more time for legislative work, the ministry having no thought of dodging interpellations or arranging them in any way. They were to be arranged chronologically and each was to be taken up in turn. But this rule proved to be impracticable, for there were two distinct classes of interpellations: some criticised the important phases of ministerial policy;

[1] C. D. Débats Parl., 1898-9, *passim*.

[2] *Ibid.* 1900, sess. ord., p. 1343.

[3] *Ibid.* 1900, pp. 2019-21.

[4] *Ibid.* 1904, i, 1002-3.

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others were unimportant, wasting time and undermining the authority of the ministers. The interpellations of the first class were the only means in the French Chamber of enforcing responsibility. The disorganization of the Chamber and the impotence of the ministry made it difficult to enforce responsibility for legislation. The budget is no more the work of the ministers than it is the work of the budget committee. The budget actually passed is different from either of the preliminary schemes. Everyone has a hand in its making and no party has had enough control to make it properly responsible. The non-partisan character of committees has the same effect upon other legislation. It is thus impossible to hold the ministers responsible for the details of legislation. The traditional use of the interpellation as a means of criticism gave the deputies an admirable instrument for enforcing responsibility of a general character. An issue was brought up in an interpellation, and if the ministers could not command a majority it was not likely that they could pass any legislation on that subject. The danger lay in the inability of the ministers to avoid defeat upon a matter which they did not really consider a question of ministerial policy, but which could be turned against them. Such interpellations and those which merely wasted time because of their unimportance, made the general right dangerous, although the interpellation might be shorn of all its real danger if the ministers could decide which ones should be discussed. When interpellations were limited to one day per week the ministers were obliged to take control in order to devote the time to such as really criticised some point of government policy. But the ministers had no deliberate intention of assuming new responsibilities for the arrangement of business and the custom of controlling interpellations developed slowly.

Under M. Méline's ministry, when the rule was first applied, there was little arrangement. The time for interpellations was limited, the discussion of some was postponed, the deputy did not feel entirely free to interpellate the ministers and but few if any were indefinitely postponed and dropped.[1]

[1] C. D. Débats Parl., June 24, 1897, p. 1651. Doc. Parl., 1898-99 p. 1519. Interpellations may be followed in the lists published in the regulation of the order of the day, Thursdays.

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When Waldeck-Rousseau met his first Chamber, further development of ministerial control had become necessary. The extraordinary session held in the fall of 1900 had an unusual amount of legislative work to finish. A list of interpellations long enough to occupy the greater part of the session was also awaiting discussion. The budget was not very far advanced. Reforms were expected of the Chamber. At the opening of the session, Waldeck-Rousseau presented a scheme for the organization of business which was accepted with some amendments, as the Chamber preferred morning sittings to sitting on Saturday. Such a systematic proposal from the ministry was in itself an innovation and it indicated a determination to get something done which resulted in further innovations.

At first there was no attempt at arrangement. By general consent the interpellation on the general policy of the ministry was discussed at once, but after that the strict order was followed until late in December. At the request of the committee on the budget an interpellation was inserted near the head of the list (Dec. 20); an interpellation upon foreign policy was similarly inserted December 28, this time at the suggestion of the ministers. In the session of 1901 the ministry began to arrange the head of the list quite regularly, especially during January and February. They also began to select such interpellations as they desired to discuss and brought them along quickly. If the Fridays regularly set apart did not suffice other days might be used. A vote of the Chamber was required for everything, but the lack of an organized opposition made it easy to carry any definite proposition of this sort. The deputies did not feel obliged to vote with the ministers, perhaps, but their interest in the interpellation secured their vote.

The extent to which this process of filling up the head of the list might be carried is admirably illustrated by the history of the interpellation of M. Pastre upon the removal of several Socialists from university positions. His interpellation was at the head of the order of the day for June 28, 1901. The discussion of the budget postponed debate until the fall session. Other interpellations were discussed in the fall, and that of M. Pastre was only next to the head of the list at the close of the

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session. When the legislature assembled in January, 1902, the interpellation of M. Pastre was again displaced. Those slipped in ahead of his were disposed of quickly, however, and his was finally discussed January 16 and 31. The important interpellations had been discussed and the government left the interpellators to themselves. Thirty or forty still remained to be taken up, but most of them were dropped, as the long postponement had rendered them obsolete.

Under the Combes cabinet the arrangement of interpellations became more marked. Some of a non-political character were discussed, yet the debate centered on matters of political importance. The policy begun by Waldeck-Rousseau was carried out more completely and logically. As he resigned in June, a few weeks of the ordinary session remained, but no interest was taken in interpellations so late in the session. When the Chamber assembled in the fall there was a long list which had been sent in during the recess. M. Combes took the initiative October 14, proposing to group all the interpellations upon the decrees lately issued to regulate the religious houses. This group was placed at the head of the order of the day. Those on strikes were collected in a group and given the second place. Those addressed to the minister of war and one on the Humbert affair were to follow. These discussions occupied all the time devoted to interpellations during October and November. M. Combes again asserted himself in regulating the order of the day for November 27, inserting an interpellation near the head of the list. On March 5 he prevented the Chamber from voting itself a short recess and carried a proposition to devote two of the days saved in this manner to interpellations upon foreign affairs.[1]

The importance of these changes lies not only in the saving of time for legislative work and the reduction of the element of danger in the interpellation but also in the new attitude of the

[1] The Friday rule was not always observed. In the fall of 1902 four Fridays were used by the ministry: Oct. 24, Nov. 7, Nov. 28, Dec. 5. The Chamber reassembled Jan. 13; Jan. 29, Feb. 6, 13, 27, and March 6 were used for the budget. Interpellations were discussed out of course, Oct. 14, 21, 23, Jan. 15, Feb. 21, March 10 and 11.

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ministry to the work of the Chamber. The ministers have taken charge of business as never before, arranging interpellations, using Fridays for budget or legislation, interfering when the Chamber desires a recess that is not necessary. Done without any formal change in the règlement, this is nevertheless the most significant change in parliamentary practice since the beginning of the reform movement. It is indicative of a new attitude towards the private member which will probably supplant the old principle of individual initiative. The ministry is recognized as the controlling power in the Chamber in respect to interpellations. It is but a short step from this to a general control of the Chamber. The limitation of the individual initiative which the Chamber was unwilling to undertake deliberately has begun in a most drastic fashion in this unpremeditated manner.

The possibilities of the movement have been clearly seen by the champion of the individual deputy, M. Gauthier de Clangy. Seeking to bring out the rapidity of the development of the new attitude, he referred to a case just previous to 1897, when the proposal to postpone an interpellation for six months was ruled out by the president as a confiscation of the right and as an illegal attack upon the status of the individual deputy. "But you Gentlemen of the Majority have improved upon your predecessors; you no longer postpone interpellations for six months when they displease you, you suppress them entirely when the ministers order you not to allow them to come before the Chamber."[1] He then moved that the president of the Chamber be instructed to enforce the rule requiring the discussion of an interpellation within a month of its presentation. The motion was carried, March 18, 1904, but was of no avail.

The principle which caused the failure of so many reform projects and mutilated the reform of the committee system has thus suffered a most important limitation. The thorough reorganization of legislative machinery which was hitherto impossible has now a chance of success.

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[1] C. D. Débats Parl., 1904, i, 1003-4.

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THE SOCIAL COMPOSITION OF THE PRIMITIVE ROMAN POPULUS

OF the many problems connected with the early political and constitutional history of Rome doubtless the most fundamental is that of the social composition of the primitive *populus* and of its component elements, the tribes and the *curiae*. Our solution of this problem will determine our conception of the whole course of constitutional development and of the accompanying political struggles, to the complete equalization of the social ranks. For if we believe, as do many of the moderns, that the primitive Roman state was made up exclusively of patricians, we are forced to the conclusion that the constitutional development to the passing of the Hortensian laws centered in the gradual admission of the plebeians and the clients to citizenship—perhaps even in the amalgamation of two distinct peoples. If on the other hand we take the ground that from the beginning the plebeians and the clients were citizens and voted in the *comitia curiata*, we must think of these inferior classes as struggling through the early history of their country for the acquisition not of citizenship but of various rights and privileges, social, economic, religious and political, formerly monopolized by a patrician aristocracy. In attempting to solve the problem here proposed it will be advantageous to consider (1) the ancient view, (2) the conventional modern view, (3) the comparative-sociological view.

I. *The ancient view*

The three social classes of freemen—plebeians, patricians and clients—were formed within the citizen body by official recognition of existing distinctions not of nationality but of merit. The first step in the process was the differentiation of the patricians from the plebeians. According to Cicero, Romulus constituted a number of chief men into a royal council, the Senate, whose members he so highly esteemed as to have them called

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patres, and their children patricians.[1] Cicero thinks of the multitude as existing at first without a politically recognized nobility, yet showing natural distinctions of worth. By calling into the Senate the ablest and best men, the state ennobled them and their familes.[2] Livy's[3] view is similar: Romulus selected from the multitude a hundred senators, whom he named *patres* and whose descendants were called patricians. They were chosen because of their wisdom;[4] on that ground the state granted them nobility,[5] which accordingly in Rome, as in every early community, was founded on personal merit.[6] In the more detailed theory of Dionysius,[7] Romulus

distinguished those who were eminent for their birth and celebrated for their virtue, and whom he knew to be rich in the account of those times and who had children, from the obscure and mean and poor. The lower class he called plebeians, Greek δημοτικοί, and the higher *patres*, either because they were older than the others, or had children, or were of higher birth, or for all these reasons . . . . The most trustworthy historians of the Roman constitution assert that owing to these facts they were called *patres* and their descendants patricians.

According to Plutarch,[8] "Romulus, after forming the army, employed the rest of the people as the citizen body (δῆμος); the

[1] Rep. ii, 8, 14; 12, 23: "Senatus, qui constabat ex optimatibus, quibus ipse rex tantum tribuisset, ut eos patres vellet nominari patriciosque eorum liberos."

[2] In the expression "omnibus patriciis, omnibus antiquissimis civibus," Cicero (*Caec.*, 35, 101) intends no more than to include the patricians among the oldest citizens, whom he is contrasting with the newly-admitted "municipes." Only the most superficial examination of the passage (*cf.* Willems, Sénat de la République romaine, i, 7) could make "omnibus patriciis" equivalent to "omnibus antiquissimis civibus."

[3] i, 8, 7. [4] *Ibid.*: "Consilium deinde viribus parat."

[5] Livy, iv, 4, 7: "Nobilitatem istam vestram quam plerique oriundi ex Albanis et Sabinis non genere nec sanguine sed per coöptationem in patres habetis, aut ab regibus lecti aut post reges exactos iussu populi."

[6] Livy, i, 34, 6: "In novo populo, ubi omnis repentina atque ex virtute nobilitas sit."

[7] ii, 8, 1–3. In 12, 1, he shifts his point of view: Romulus chose the hundred original senators from the patricians.

[8] Romulus, 13; *cf.* Q. R., 58.

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multitude he called *populus*, and appointed a hundred nobles to be councillors, whom he called patricians, and their assembly the Senate.'

There can be no doubt, therefore, as to the opinion of the ancient writers. They believed that from the beginning social distinctions existed naturally within the *populus Romanus*, and that these distinctions were made the basis of an official division of the people into nobles and commons, *patricii* and *plebs*, by the government. This view is not only reasonable in itself, but is supported, as we shall see, by analogies drawn from many other states.

All the sources make the patriciate depend upon connection with the Senate, Dionysius alone showing some inconsistency on this point,[2] Why the senators were called *patres* the ancients give various reasons. Cicero[3] thinks *patres* a term of endearment; Sallust[4] believes that the name was applied either because of age or because of the similarity of their duty; Livy[5] sets it down as a title of honor; Festus[6] thinks chiefly of their age and wisdom; Paulus,[7] his epitomator, suggests that they were so called because they divided their lands among the poorer class as fathers among children; Dionysius[8] gives three possible reasons, (1) greater age, (2) possession of children, (3) family reputation. The sources generally agree in rep-

[1] *Cf.* further Ovid, Fasti, iii, 127 *et seq.*; Vell. Pat., i, 8, 6; Festus, 246, 23; 339, 11.

[2] There is no inconsistency, however, in the fact that some noble *gentes* claimed descent from Aeneas or from deities (*cf.* Seeley, Livy, 57) or from Alban or Sabine ancestors (*cf.* Livy, i, 30, 2; iv, 4, 7; Dion. Hal., ii, 46, 3; iii, 29, 7); they were nobles in their original homes before the founding of Rome, but became patricians only by an act of the Roman government.

Although after the creation of the first hundred *patres*, the ancients do not distinctly state that each newly made senator was the founder of a new patrician family, they do represent the enlargement of the Senate and of the patriciate as going hand in hand; in this way they continue to make the patriciate depend upon membership in the Senate; *cf.* Livy, i, 30, 2; 35, 6; Dion. Hal., ii, 47, 1; iii, 67, 1; Madvig, Verfassung und Verwaltung des römischen Staates, i, 75.

[3] Rep., ii, 8, 14; *cf.* Vir., Ill., ii, 11.

[4] Cat., 6, 6; *cf.* Isid. Etym., ix, 6, 10: "Nam sicut patres suos, ita illi rem publicam habebant" (or "alebant").

[5] i, 8, 7. [6] 339, 11. [7] 247. [8] ii, 8, 1.

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resenting the *patres* as men who in age, honor, authority and duty stood toward the rest of the citizens as a father toward his children, and in identifying these social-political *patres* with the senators.[1] An examination of the word itself will tend to confirm the ancient view. It seems to have originally signified "protector," "keeper," "nourisher,"[2] hence "owner," "master." *Pater familias* is nourisher, protector and master of a household.[3] In late Roman law the term continued to refer not necessarily to actual parentage but rather to the legal position of the head of a household;[4] in fact it is only in a distantly derived sense that *pater* comes to signify the male parent. Ideas early attaching to the word, accordingly, are those of power or authority and age. The Senate, as this word indicates, was originally made up of elderly men, *senatores, maiores natu*,[5] It would be natural to call them *patres* because of their authority over the community or of their age. As a designation of rank, *pater*, excepting in jest, is always plural,—an indication that the authority and dignity did not attach to the individual noble but to the senators collectively; they were collectively *patres* of the community, not individually *patres* of children, clients or *gentes*.[6] But when in time a limited number of families monopolized the Senate, the term could easily be extended to the entire privileged circle, meaning those with hereditary right to authority over the rest of the community.[7]

[1] *Cf.* Mommsen, Römische Forschungen, i, 227.

[2] From the root *pa*, to protect, preserve, *conservare;* Pott, Wurzel-Wörterbuch der Indogermanischen Sprachen (2d ed.), 221; Corssen, Aussprache der lateinischen Sprache, i, 424; Schrader, Sprachvergleichung und Urgeschichte, 538; Lécrivain, in Daremberg et Saglio, Dict., ii, 1507.

[3] Dig., 1, 16, 195, 2: "Pater familias appellatur qui in domo dominium habet.' In like manner *patronus* is protector of clients, *pater patriae*, protector of his country; Pott, *ibid.* 227.

[4] Ulpian, in Dig., *ibid.:* "Pater autem familias recte hoc nomine appellatur, quamvis filium non habeat; non enim solam personam eius, sed et ius demonstramus: denique et pupillum patrem familias appellamus."

[5] Livy, i, 32, 10 (from a fetial formula).

[6] Rubino, Römische Verfassung und Geschichte, 186; Mommsen, Röm. Forsch., i, 228, n. 16.

[7] In the same way *reges* is made to include the whole family of the *rex;* Livy, i, 39, 2. For other illustrations of the same principle, see Rubino, *ibid.* 188, n. 1.

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Though in the sources the *patres* are generally senators, the word is sometimes synonymous with *patricii*.[1]

Regarding *patricius* the Romans reasoned with somewhat less care. They were right in deriving it from *pater*, but they made it signify "descended from," whereas in fact it means "belonging to,"[2] and designates accordingly the families of the political *patres*. Probably it was formed after *patres* began to apply to the entire governing class—a development which would tend to throw the latter word back to its earlier and narrower sense.

Had the investigation of these words on the part of the ancients rested at this point, all would have been well; but an unfortunate guess as to the derivation of *patricii* by some unknown antiquarian has brought into the study of the social ranks unutterable confusion lasting down to the present day. This conjecture derives *patricius* from *patrem ciere*, making it signify "one who can cite a father." The attempted etymology, clearly a failure, would perhaps have been harmless, had it not connected itself with the ambiguous word *ingenuus*. Cincius[3] says, "Those used to be called patricians who are now called *ingenui*." Livy has the two ideas in mind when he represents a plebeian orator as inquiring, "Have ye never heard it said that those first created patricians were not beings sent down from heaven, but such as could cite their fathers, that is, nothing more than *ingenui?* I can now cite my father—a consul—and my son will be able to cite a grandfather."[4] There should

[1] The Twelve Tables seem to apply it to all patricians, not to senators alone; Cicero, Rep., ii, 37, 63: "Conubia . . ut ne plebei cum patribus essent;" Livy, iv, 4, 5: "Ne conubium patribus cum plebe esset;" perhaps also in ii, 33, 1: "Neve cui patrum eum magistratum liceret," *patrum* is equivalent to *patriciorum*. These passages, however, do not afford absolute proof; for Gaius, bk. vi, ad legem Duodecim Tabularum (Dig., 1, 16, 238: "Plebs est ceteri cives sine senatoribus"), probably commenting on the very law quoted by Cicero and Livy, seems to understand *patres* as senators; *cf.* Vassis, Athena, xii, 57 *et seq.*

[2] *Cf. tribunicius* from *tribunus*, Pott, *ibid.* 227; *patricius* is an adjective signifying paternal, ancestral, belonging to parents or progenitors; Corssen, *ibid.* i, 53.

[3] In his work on the *Comitia*, quoted by Festus, 241, 21: "Patricios eos appellari solitos qui nunc ingenui vocentur."

[4] x, 8, 10: "En umquam fando audistis patricios primo esse factos non de caelo demissos, sed qui patrem ciere possent, id est nihil ultra quam ingenuos" . . .?

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be no doubt as to the meaning of these passages; the antiquarian who conjectured that *patricius* was derived from *patrem ciere*, and therefore defined *patricii* as those who could cite their fathers, meant merely those who had distinguished fathers, and hence were of respectable birth. Ordinarily in extant Latin literature *ingenui* are simply the freeborn; and in making Appius Claudius Crassus in 368 B. C. include in the term the whole body of citizens Livy[1] dates this meaning back to the period before the Licinian-Sextian laws. Elsewhere are indications that in early times *ingenui* connoted rather respectable birth, and so applied especially to the patricians.[2] The quotation from Cincius and the attempted derivation of *patricius* from *patrem ciere*, accordingly, are sufficiently explained without resorting to the strange hypothesis, held by some, that in primitive Rome the patricians were the only men of free birth.

In summarizing the ancient view as to the origin and nature of the patriciate, it will be enough to say that the king chose from the people men who were eminent for the experience of age, for ability and reputation, to sit in his council, the Senate; the men so distinguished were called *patres*, whereas the adjective *patricius* applied as well to their families—the *patricii* being those who could cite illustrious fathers. From this point of view the Roman nobility did not differ from that of most other countries.

[1] vi, 40, 6.

[2] Plutarch, Q. R., 58: "Those who were first constituted senators by Romulus were called *patres* and *patricii* as being men of good birth, who could show their pedigree." In its adjectival and adverbial uses *ingenuus* connotes not the quality of free birth, but respectability, nobility. The original meaning is "born within," hence indigenous, native: *cf.* Forcellini, Totius Latinitatis Lexicon, *s. v.* In this sense it could not apply to the patricians, who generally claimed a foreign origin. But native is superior to alien; doubtless in this secondary meaning of excellence it attached to the nobility, the close relation of the word to *gens* (family, lineage) attracting it in that direction. Afterward it was so democratized as to include all the freeborn. With this meaning we find it as early as Plautus, Mil., iii, 1, 189; iv, 1, 15. According to Dionysius, ii, 8, 3, the identification of *patricii* with *ingenui* in its sense of freeborn was accepted not by the most trustworthy historians, but by certain malicious slanderers: "Some say they were called patricians because they alone could cite their fathers, the rest being fugitives and unable to cite free fathers."

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The *plebs*,[1] then, were the mass of common freemen, from whom the nobility was differentiated in the way described above. From the ancient point of view they existed from the beginning, prior even to the patriciate itself.

It is equally true that in the opinion of the ancients the *plebs* were prior to the clients. Cicero[2] records that Romulus distributed the *plebs* in clientage among the chief men; Dionysius adds that he gave the plebeians liberty to choose their patrons from among the patricians.[3] Thus far their view is in complete accord with modern sociology, which teaches that such class distinctions first arise through the differentiation of freemen. Although aware of the fact that clientage existed in other states which were presumably older than Rome,[4] her historians doubtless felt that the institution could have been legalized in their own country only by recognition on the part of the government. They did not, however, work out a consistent theory of the relation between this class and the plebeians. Certain passages[5] hint, though they do not expressly assert, that at one epoch all the plebeians were in clientage, whereas in their accounts of political struggles the ancient writers uniformly array clients against plebeians from the earliest times.[6] The latter view is historically better founded.

There must have been various origins of clientage, with corresponding gradations of privilege. The *libertini* were citizens with straitly limited rights; other clients, certainly the greater part of the class, not only followed their patron to war[7] and to the forum,[8] but also testified and brought accusations in the

[1] The word is probably derived from the same root as *populus;* Corssen, Aussp. d. Lat., i, 368.

[2] Rep., ii, 9, 16. [3] ii, 9, 2.

[4] Notably among the Sabines, Livy, ii, 16, 4; Dion. Hal., ii, 46, 3.

[5] Cicero, Rep., ii, 9, 16; Dion. Hal., ii, 9, 2.

[6] *Cf.* the citations in Mommsen, Römisches Staatsrecht, iii, 71, n. 1. Dionysius, ii, 63, 3, distinguishes the two classes as early as the *interregnum* which followed Romulus.

[7] Dion. Hal., v, 40, 3; vi, 47, 1; vii, 19, 2; x, 43. As late as 134 B. C. Scipio called his clients to follow him to the Numantine war; Appian, Hisp, 84.

[8] Livy, iii, 58, 1.

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courts[1] and voted in the assemblies;[2] and when the plebeians gained the right to hold offices the clients were admitted along with them to the same privilege.[3] In his relation with the state, therefore, the ordinary client did not differ essentially from the plebeian.

From the preceding examination of the social ranks it at once becomes evident that the ancients made the *populus* comprise both patricians and plebeians; in further proof of their view may be cited the following juristic definition: "*Plebs* differs from *populus* in that by the word *populus* all the citizens are meant, including even the patricians, whereas *plebs* signifies the rest of the citizens, excepting the patricians."[4] Since the sources generally consider the patricians the descendants of the hundred original senators,[5] they cannot help regarding the *populus* as composed chiefly of plebeians. In common speech the term, like our word people, often applies to the lower class as distinguished from the higher, in which sense it is interchangeable with *plebs;* often, too, it signifies the people in contrast with the Senate.[6] It is clear, then, as Mommsen has pointed

[1] Dion. Hal., ii, 10, 3.

[2] Livy, ii, 56, 3; 64, 2; Dion. Hal., ii, 10, 3; iv, 23, 6; ix, 41, 5.

[3] Dion. Hal., ii, 10, 3 (it was not lawful for either patron or client to vote against the other). Marius, a client of Herennius, was elected to the praetorship; Plut. Mar., 5. A law declared that election to a curule office (according to Plutarch, or as Marius asserted to any office) freed a man and his family from clientage. Evidently this law was passed in or after 367 B.C. Mucius, a client of Ti. Gracchus, was elected to the plebeian tribunate; Plut. Ti. Gracchus, 13. Cn. Flavius, who was the son of a freedman and probably therefore a client, was elected curule aedile for 304 B.C.; Livy, ix, 46, 1; Val. Max., ii, 5, 2.

[4] Gaius, i, 3: "Plebs autem a populo eo distat, quod populi appellatione universi cives significantur connumeratis etiam patriciis; plebis autem appellatione sine patriciis ceteri cives significantur." Evidently Pomponius held the same view; Dig., i, 2, 2, 1–6; *cf.* Capito, in Gell., x, 20, 5; Festus, 233, 29; 330, 19; Isid. Etym., ix, 6, 5 *et seq.*; Mommsen, Röm. Staatsr., iii, 4, n. 2.

[5] Cicero, Rep., ii, 12, 23; Livy, i, 8, 7; Zonaras, vii, 9; Isid. Etym., ix, 6, 6.

[6] Illustrations of this common use are Cicero, Rep., ii. 8, 14; 12, 23; Livy, ii, 54, 3; iv, 51, 3; x, 13, 9; xxv, 2, 9; 3, 13; 3, 16; xxx, 27, 3; xxxiv, 54, 4; xxxvii, 58, 1; xliii, 8, 9. The Greeks always regard *populus* as the equivalent of δῆμος; *cf.* Plut. Rom., 13. Not only does the tribune in addressing the *plebs* call them *populus Romanus* (Sall. Iug., 31), but the consuls also apply the term to the same class (Livy, xxv, 4, 4); and a statement of Cicero (Leg. Agr., ii, 7, 17), which has the appearance of a legal definition, makes the people of the thirty-five tribes under a tribune the *universus populus Romanus.*

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out,[1] that if *populus* signifies first the whole body of citizens and secondly the commons as distinguished from the nobles, it could not possibly have as a third equivalent the patricians as distinguished from the plebeians. In certain formulæ found in addresses, wills, prayers and oracles, *populus* is so joined with *plebs* (*populus plebesque* or the like) as to suggest the possible meaning patricians.[2] The combination of the two words with *senatus*,[3] however, reveals at once the overlapping of the terms so combined. In these passages reference is to the modes by which an individual may apply to the state; he may address the consuls, praetors or plebeian tribunes, and in the same way the Senate, *populus* or *plebs*.[4] Hence in these formulæ the word *populus* does not apply solely to the patricians, and the same may be said of its use in all other connections. We may conclude, therefore, that the Latin language gives no hint of an exclusively patrician *populus*.

Regarding the *populus* as made up of patricians, plebeians and clients, our sources necessarily ascribe the same social composition to its divisions, the three old tribes and the thirty *curiae*.[5] With perfect consistency they mention repeated enlargements of the *populus* and of the tribes and *curiae*, through the admission of masses of aliens, most of whom must have remained plebeian. In fact the sources uniformly represent all the kings as freely admitting conquered aliens without exception to the citizenship and to the tribes and the *curiae*, even compelling some forcibly to enter this condition.[6]

[1] Röm. Forsch., i, 172.

[2] Cicero, Fam., x, 35; Verr., v, 14, 36; Mur., i, 1; Livy, xxix, 27, 2; Tac. Ann., 1, 8; Macrob. Sat., 1, 17, 28; *cf.* Mommsen, Röm. Forsch., i, 169, n. 4.

[3] E. g. senatui populo plebique Romanae; Cicero, Fam., x, 35 (address).

[4] Mommsen, Röm. Staatsr., iii, 6, n. 4; Soltau, Altrömische Volksversammlungen, 84.

[5] For the division of the *populus* into tribes and *curiae*, see Cicero, Rep., ii, 8, 14; Livy, i, 13, 6; Dion. Hal., ii, 7, 2; Appian, B. C., iii, 94. The author of Vir. Ill., ii, 12, in supposing that the *plebs* alone were assigned to the tribes is certainly wrong; but his mistake is pardonable in view of the general agreement among our sources that the *populus*, πλῆθος, contained in the *curiae* were mainly plebeian.

[6] Cicero, Rep., ii, 7, 13; 8, 14; 18, 33; Livy, i, 13, 4; 13, 6; 28, 7; 30, 1; 33, 1–5; Dion. Hal., ii, 46, 2 *et seq.*; 47, 1; 50, 4 *et seq.*; 55, 6; iii, 29, 7; 30, 3; 31, 3; 37, 4; 48, 2; iv, 22, 3.

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Might the plebeians and clients belong in a restricted sense to the *populus* and *curiae*, and yet remain so far inferior to the patricians as to be excluded from the political meetings of the *curiae*—the *comitia curiata?* There can be no uncertainty as to the answer to this question, for the ancient writers agree that the *comitia curiata* included plebeians and clients as well as patricians.[1] Not only did the lower classes attend this assembly, but they also voted in it, and constituted the majority.[2]

II. *The conventional modern view*

The passages cited above suffice to prove that the ancient writers thought of the *populus*, and consequently of the *comitia curiata*, as composed from the earliest times of patricians, clients and plebeians. Another question, far more difficult, is whether the ancients were right in their view.

As none of the authorities on whom we directly depend for our knowledge of Roman affairs lived earlier than the last century of the republic, they could have had no first-hand acquaintance with primitive Roman conditions, but must have drawn their information concerning the remote past from earlier writers—the annalists—now lost. Niebuhr, who in the opening years of the last century introduced the modern method of investigating Roman history, was convinced that writers of the late republic and of the empire, lacking historical perspective and interpreting their sources in the false light of existing or recent conditions, came to wrong conclusions in regard to the primitive Roman state. He believed he could point to instances of such misunderstanding and he thought it within the power of a well-equipped modern historian to eliminate much of the error so as to come near to the standpoint of the earlier and more trustworthy annalists.[3]

[1] *Cf.* Dion. Hal., ii, 8, 4.

[2] Livy, i, 17, 11; 35, 2; 43, 10; 46, 1; Dion. Hal., ii, 10, 3; 14, 3; 60, 3; 62, 3; iv, 12, 3; 20, 2.

[3] *Cf.* Lectures on the History of Rome, i, 80, 83: "I beg you to mark this well . . . that even ingenious and learned men like Livy and Dionysius did not comprehend the ancient institutions and yet have preserved a number of expressions from their predecessors from which we, with much labor and difficulty, may elicit the truth."

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The position of Niebuhr has in the main proved untenable. Notwithstanding all the source-sifting of modern times, pursued most zealously by the Germans, we are obliged to admit that it is rarely possible with any fair degree of certainty to discover the view of an annalist on a given subject excepting in the few cases in which the citation is by name. We must also admit that though Cicero and the Augustan writers might misinterpret Fabius Pictor in minor details, it is inconceivable that they should fail to understand his presentation of so fundamental a subject as the character of the original *populus* or the composition of the earliest assembly. Present scholarship accordingly insists that in such weighty matters there was no essential difference of view between earlier and later writers.[1]

These considerations have simplified but not solved the problem. Scholars now agree that no contemporary account of the regal period—ending 509 (?) B. C.—ever existed; and even if it be conceded that the earliest Roman annalist—Fabius Pictor, born about 250 B. C.—had access to traditional or documentary[2] information reaching back to the close of that period, no historian will admit such a possibility for the beginnings of Rome. It follows then that for the origin and character of her earliest institutions Cicero, Livy and Dionysius, or their sources, have relied wholly on inference from later conditions, in so far as they have not resorted to outright invention. Though with their abundant material they were in a far better position for making such deductions than we are, they lacked the experience and the acute critical method of the moderns.[3] Of the three writers above mentioned—our main sources for the subject under discussion—Cicero was essentially an orator, Dionysius a rhetorician, and Livy, though historian in name, was in spirit

[1] The school of Mommsen, which still clings to Niebuhr's theory of an exclusively patrician *populus*, has abandoned the attempt to support it by a reconstruction of lost sources.

[2] The late regal period may have left a few documents which, if used by the annalists, might have thrown light on the condition of that time. It has not yet been determined whether the inscription recently found in the Roman Forum belongs to the late regal or to the early republican period.

[3] Mommsen, Röm. Staatsr., iii, 69, grants to the ancients far more knowledge of their own history, but claims a "wider horizon."

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rhetorical and dramatic rather than critical, Naturally therefore they or their sources, who on the whole were equally uncritical, made mistakes in the difficult work of drawing inferences as to the history and institutions of the regal period. Such is the view of historians to-day. It was formerly argued that Dionysius, a rhetorician and a Greek, failed in spite of his twenty-two years of preparation at Rome to understand the spirit and character of the Roman constitution and has therefore been an especial fountain of error;[1] but it is now clear that though he shows far greater amplitude than Livy and is for that reason proportionally more liable to error in detail, he follows good Roman sources for institutions, and is in this field, with the reservation here mentioned, not essentially inferior to the extant native writers.[2]

Considering the sources untrustworthy and following certain clues which he believed they afforded to a right understanding of the annalists, Niebuhr came to his theory as to the composition of the primitive Roman state. Although he asserts that it was made up of "patrons and clients,"[3] he does not rest satisfied with this view, but proceeds to trace clientage to the following origins, as though in his opinion this institution did not exist from the beginning: (1) some native Siculians perhaps, who were conquered by Latin invaders; (2) strangers settling on Roman territory and choosing a Roman as protector; (3) inhabitants of communities which were obliged to take refuge under Roman protection; (4) manumitted slaves.[4] Logically he goes back to a state made up exclusively of patricians.

[1] Niebuhr treats Dionysius with great respect; *cf.* Lectures, i, liv: "The longer and more carefully the work is examined, the more must true criticism acknowledge that it is deserving of all respect, and the more it will be found a store-house of most solid information." Schwegler, Römische Geschichte, i, 621 *et seq.*, and 626 *et seq.*, assumes that Dionysius is alone responsible for the view that the plebeians were in the primitive tribes and the *curiæ*. A glance at the citations given above, p. 506, will show, however, that Cicero and Livy shared this view.

[2] *Cf.* Pais, Storia di Roma, i, 1, 82. The usual opinion (*cf.* Bernhöft, Römische Königszeit, 8 *et seq.*) is that the sources of Dionysius are later and less trustworthy than those of Livy, but Pais asserts that on the whole the two authors drew from the same sources.

[3] History of Rome, i, 165. [4] Lectures on Roman history, i, 81, 100 *et seq.*

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He sought evidence for this hypothesis in the scheme of tribal organization of Rome. The primitive city was divided into three tribes, thirty *curiæ* and, as he believed, three hundred *gentes*. As no one could be a citizen without membership in a *gens*,[1] and as the patricians alone were active members of the *gentes*,[2] it must follow that the patricians alone were citizens. It is doubtful whether he would have proposed this hypothesis had it not been for the analogy of the Attic tribal scheme. An imperfect quotation from the lost part of Aristotle's *Constitution of Athens*[3] seems to signify that the Athenian state was once divided into four tribes (φυλαί), twelve phratries and three hundred and sixty *gentes* (γένη.) On this authority Niebuhr supposes that the phratry was a group of *gentes*, and he assumes further that both phratries and *gentes* were composed exclusively of eupatrids.[4] But the suppositions (1) that there were three hundred and sixty *gentes*, (2) that the phratry was a group of *gentes*, (3) that both phratries and *gentes* contained only eupatrids are contradicted by well known facts. From the earliest times the Greek tribes and phratries included commons as well as nobles. This is true of the Homeric Greeks,[5] and a law of Draco[6] proves that the early Attic phratry comprised both nobles and commons. In historical times all citizens belonged to the phratries; whereas but few were members of the *gentes*.[7] Most of the *gentes* were in fact composed of the old landed nobility, though a few, like the Chalkidae and the Eupyridae, were apparently industrial guilds, which had received

[1] History of Rome, i, 158.

[2] In *ibid.* i, 162, he excludes the "freed clients" from the *gens;* in 165 he states that the nobles alone *had* the *gens*, the clients belonged to it in a dependent capacity.

[3] *Cf.* the edition of Sandys, 252; Rose, Aristotelis Frag., 385.

[4] History of Rome, i, 160. Genz, Patricisches Rom., 6, has the same idea.

[5] Il., ii, 362 *et seq.*; ix, 63 *et seq.*

[6] CIA. i, 61; *cf.* Dem., xliii, 57.

[7] This is illustrated, for instance, by a law quoted by Philochorus, Müller, Frag. Hist. Graec., i, 399, 94; Τοὺς δὲ φράτορας ἐπάναγκες δέχεσθαι καὶ τοὺς ὀργεῶνας καὶ τοὺς ὁμογάλακτας, οὓς γεννήτας καλοῦμεν ("The members of the phratry must receive the *orgeones* as well as the *homogalaktes*, whom we call *gennetae*"). This fact is now too well known to need further proof; *cf.* Gilbert, Constitutional Antiquities of Sparta and Athens, 148 *et seq.;* Thumser, Griechische Staatsaltertümer, 324 *et seq.*

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the privileges of the *gentes*. So far therefore from supporting Niebuhr in his peculiar view of the Roman *gentes* and *curiae*, the Attic analogy militates in every way against him.

He believed that he found confirmation of his view in certain statements of the ancient writers which seemed to him to have a bearing on the question. The first is Dion. Hal. ii, 7, 4: "Romulus divided the *curiae* into decades, each commanded by a leader, who in the language of the country is called decurion."[1] The word decurion proves that in speaking of decades Dionysius is thinking of the military divisions called *decuriae*, each commanded by a decurion. In historical times the troop of cavalry—*turma*—was divided into three *decuriae* of ten each, as the word itself indicates. There were accordingly three decurions to the *turma*, and ten *turmae* ordinarily went with the legion.[2] From Varro[3] we learn that the three primitive tribes furnished *turmae* and *decuriae* of cavalry, the *decuriae* commanded by decurions. Dionysius accordingly refers to military companies—either to the well known *decuriae* of cavalry or to corresponding companies of footmen which probably existed before the adoption of the phalanx.[4] Had Dionysius meant *gentes*, he would have used the corresponding Greek word γένη. Niebuhr[5] inferred from this passage that each *curia* was divided into ten *gentes*, making three hundred *gentes* for the entire state; but a careful interpretation shows that no reference to the *gentes* is intended. We cannot infer therefore from this citation that the *curia* was divided into *gentes*.

The other passage relative to the question is Gellius xv, 27, 4,[6] in which Laelius Felix states that the voting in the *comitia*

[1] Διῄρηνται δὲ καὶ εἰς δεκάδας αἱ φράτραι, πρὸς αὐτοῦ, καὶ ἡγεμὼν ἑκάστην ἑκόσμει δεκάδα, δεκουρίων κατὰ τὴν ἐπιχώριον γλῶτταν προσαγορευόμενος.

[2] Polybius, vi, 25, 1; *cf.* 20, 9. [3] L. L., v, 91.

[4] There is no need of assuming, with Bloch, Origines du Sénat romain, 102–105, that the *decuriae* mentioned by Dionysius are "purely imaginary."

[5] *Cf.* also Schwegler, Röm. Gesch., i, 612 *et seq.* The antiquated view is still held by Herzog, Römische Staatsverfassung, i, 96 *et seq.*, and by Lécrivain, in Daremberg et Saglio, Dict., ii, 1504. Though Ihne, History of Rome, i, 113, n. 3, believes that the *curiae* were composed of *gentes*, he is doubtful as to the number.

[6] "Cum ex generibus hominum suffragium feratur, curiata comitia esse; cum ex censu et aetate, centuriata; cum ex regionibus et locis, tributa."

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curiata was by *genera hominum* in contrast with the *census et aetas* of the centuriate assembly and with the *regiones et loca* of the *comitia tributa*. Niebuhr identifies *genera* with *gentes*.[1] It is clear, however, that in this passage Laelius is not concretely defining the voting units of the various assemblies, but is stating in a general way the principles underlying their organization into voting units. In the *comitia centuriata* the principle is wealth and age; *census et aetas* is not to be identified with *centuria* or with any other group of individuals in this assembly. In like manner *regiones et loca* expresses the principle of organization of the tribal assembly; or if used concretely, it must designate the tribes themselves, and not subdivisions, for none existed. Correspondingly *genera hominum* signifies that the principle of organization of the curiate assembly is hereditary connection; but so far as the expression is applied concretely, it must denote the *curiae* themselves, not subdivisions. The *curia*, a religious, social and political group based on birth, might well be called *genus hominum* in contrast with the local tribe and with the century, composed artificially of men of similar wealth and age. It is well known, too, that voting within the *curiae* was not by *gentes* but by heads.[2] As no other passage from the sources, besides these two, has even the appearance of lending support to the proposition advanced by Niebuhr, and favored by others, that the *curia* was a group of *gentes*, we may conclude that this proposition is absolutely groundless. On the relation between these two groups, therefore, even without considering the nature of the *gens*, no argument can be founded for the theory of exclusively patrician *curiae*. A careful, unprejudiced examination of the *gentes* would prove that not even these smaller associations were wholly patrician.

That membership in a *curia*, rather than in a *gens*, was essential to citizenship is confirmed not only by the many passages which refer to the assignment of new citizens to the

[1] Mommsen, too, supposes that *genera* here means *gentes* but is used so as to include also the plebeian *stirpes;* nevertheless he knows that the voting in the curiate assembly was by heads rather than by *gentes:* Röm. Staatsr., iii, 9, n. 2; 90, n. 5.

[2] Livy, i, 43, 10: "Viritim suffragium . . . omnibus datum est" (*i. e.* in the curiate assembly).

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curiae,[1] but also by the consideration that had the plebeians lacked the citizenship till after the *curiae* became politically effete, they never would have been placed in the *curiae*, and these associations would not have been deemed essential to colonies and *municipia*. If too the *gens* had been a necessary element in the organization of the state, as was the *curia*, the *sacra* of the *gens*, as of the *curia*, would have been public, whereas they were in fact private.[2]

Other evidence for his hypothesis Niebuhr thinks he finds in a statement of Labeo,[3] that the curiate assembly was convoked by a lictor, the centuriate by a horn-blower; while Dionysius[4] says that the patricians were summoned by name through a messenger, the people by the blowing of a horn. Thus Niebuhr maintains that Labeo and Dionysius agree unequivocally in designating the *curiae* as the assembly of the patricians. But in fact these two sources refer to the customs of the historical age, when the curiate assembly was ordinarily attended only by three augurs and thirty lictors. Horn-blowing under these circumstances would have been absurd. The summoning of the patricians by their own name and that of their father, on the other hand, proves them too few to compose a popular assembly. These citations therefore are far from supporting his hypothesis. His last and greatest proof is the identification of the *lex de imperio*, passed by the *curiae*, with the *patrum auctoritas*. If these are merely two terms for the same act, the *curiae* must have been made up of *patres*. But by establishing the fact that the *patrum auctoritas* belonged to the Senate or to its patrician members, Willems[5] and Mommsen[6] have deprived Niebuhr's hypothesis of its main prop.

[1] *Supra*, p. 506, n. 6.

[2] Festus, 245, 28: "Publica sacra, quae publico sumptu pro populo fiunt, quaeque pro montibus, pagis, curis, sacellis. At privata, quae pro singulis hominibus, familiis, gentibus, fiunt;" also Livy, v, 52, 4. Certain *gentes*, however, had charge of special state cults; *cf.* Lécrivain, in Daremberg et Saglio, Dict., ii, 1506. Some of this class may have been originally gentile, raised afterward to the dignity of state cults, and others were probably assigned to the *gentes* by the government.

[3] Gell., xv, 27, 2. [4] ii, 8, 4.

[5] Sénat de la République romaine, ii, 34 *et seq.*

[6] Röm. Forsch., i, 233 *et seq.*; 247 *et seq.*; *cf.* Genz, Patr. Rom., 70.

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Niebuhr evidently believed that the *curiae* continued exclusively patrician through the whole republican period.[1] This idea, however, must be dismissed for the following reasons: (1) Our sources agree that in the early republic the plebeians and clients continued to vote in the curiate assembly.[2] (2) The plebeians were in the *curiae* in 208 B. C., when the first *curio maximus* was chosen from the *plebs*.[3] (3) In the time of Cicero thirty plebeian[4] lictors represented the *comitia curiata*, and gave the votes.[5] (4) Arrogations by plebeians took place in this assembly; in the well known case of Clodius it must be borne in mind that it was a plebeian who arrogated him. (5) The extinction of the patriciate did not involve the downfall of the *comitia curiata*.[6] (6) The confirmation by the *curiae* (*lex de imperio*) of elections in the centuriate assembly was conceived as a second vote of the community.[7] (7) The resolutions of the *comitia curiata* are always thought of as resolutions of the *populus*, which Latin literature nowhere restricts to the patrician body. (8) In all ancient literature there is nowhere the slightest hint of a change in the social composition of the *curiae* or of the *comitia curiata* in the whole course of their history. What the ancients believed to be true of either institution at any particular period will hold therefore for its entire history.[8]

[1] *E. g.* History of Rome, ii, 147; iii, 73: "the common council of the *patres*—the curies.

[2] Cicero, Frag. A, vii, 48; Livy, ii, 56, especially § 3; Dion. Hal., vi, 89, 1; ix, 41.

[3] Livy, xxvii, 8, 3.

[4] Mommsen, Röm. Forsch., i, 148.

[5] Cicero, Leg. Agr., ii, 12, 31.

[6] Cicero, Dom., 14, 38; Livy, vi, 41, 10.

[7] Cicero, Rep., ii, 13, 25; Leg. Agr., ii, 11, 26; *cf.* Mommsen, Röm. Forsch., i, 147, *et seq.*

[8] In the face of all evidence to the contrary two or three scholars persist in maintaining essentially the opinion of Niebuhr that through the republic the *curiae* continued patrician. Herzog, Röm. Staatsverfassung, i, 98 *et seq.*, 108, 1014, n. 2, imagines that from the beginning the clients belonged to the *curia* in its administrative capacity, shared in its *sacra*, attended its meetings, but did not vote. The *plebs*, however, were not even passive members. His reasons are too shallow to deserve mention. Vassis, Ῥωμαίων Πολιτεία ἡ βασιλευομένη καὶ ἡ ἐλευθέρα (Athens, 1903) also excludes the commons from the curiate assembly throughout its history. The fancies of Hoffmann, Patricische und plebeiische Curien (Vienna, 1879), need not detain us.

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Of the arguments in favor of Niebuhr's hypothesis either added by Schwegler[1] or brought by him into greater prominence, one only demands attention. He reasons that if the *plebs* were in the curiate assembly, it would be impossible to explain the political advance made by the institution of the *comitia centuriata;* and the constitutional history of Rome would be reduced to an insoluble riddle. Here we have to deal with a subjective argument—the rejection of sources because they do not agree with a preconceived theory. Arguments of the kind, however, which may be easily invented for the support or overthrow of every imaginable proposition, should not be allowed to carry much weight. Besides it is easy to show by analogies from the history of other peoples that the presence of the commons in the primitive assembly does not make the constitutional history of Rome a real enigma. In the primitive German assembly, for instance, were included all the warriors; and yet in the more developed German states were monarchies and aristocracies which gave the people little or no voice in the management of public affairs. The Homeric Greek assembly included all freemen, who, however, had little to do with the government in that period, and still less under the aristocracy which followed. In like manner, although the plebeians attended the *comitia curiata* and had a majority of votes in this assembly, they could not thereby control the government, because (1) they met only at the pleasure of the king or magistrate; (2) the presiding magistrate alone had the right to initiate measures; (3) he and those only whom he invited had a right to speak; the members of the assembly merely voted yes or no on the measure proposed; (4) the decision of most governmental matters lay with the king, alone or in conjunction with the Senate, the assembly being rarely requested to vote. The *comitia centuriata*, a timocratic institution, elevated the rich and degraded the poor. Here as elsewhere the poor lost by the substitution of aristocracy for kingship; but a real constitutional advance was made in the gradations of privilege, which were based on wealth and which reached like a ladder from the hum-

[1] Röm. Gesch., i, 623 *et seq.*

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blest member of the proletarian century to the patrician knight in the *sex suffragia*. These gradations prepared the way for an ultimate equalization of rights. We conclude, then, that the presence of the commons in the primitive assembly is perfectly compatible with a rational view of constitutional development.

With Schwegler, who grants however reluctantly that the commons were received into the *curiae* before 208 B. C.,[1] the history of the theory enters upon its present phase; for the great majority of writers since his time have accepted his view, yet with varying opinions as to the date of the change. Mommsen,[2] who more than anyone else, has made it clear that, so far back as our sources reach, the *populus* comprised both patricians and commons, nevertheless adopts substantially the same view, but dates the admission of the clients to the plebitate—that is to common citizenship and to a vote in the *curiae*—not later than the beginning of the republic but after their admission to the centuries.[3] In his reconstruction of the primitive state he supposes that the citizens were all *patres*, in so far as they, and they alone, could be fathers; or adjectively *patricii*, in so far as they, and they alone, had fathers.[4] Added to the citizens and their slaves was a class of persons termed clients, half way between freedom and slavery—a class made up from various origins but chiefly by the conquest of neighbors.[5] These clients belonged, as dependants, to the *gentes* and the *curiae*, but had no vote in the assembly.[6] Later the *plebs* were formed from the clients as the bond which united the latter with their patrons relaxed.[7] The *plebs*, who were free citizens of inferior rank, came into being at the moment when the patricio-plebeian *comitia centuriata* acquired the right to express the will of the community.[8]

[1] Röm. Gesch., i, 625, n. 3.

[2] Röm. Forsch., i, 140 *et seq.*

[3] *Ibid.* i, 269; Röm. Staatsr., iii, 92. Clason, Kritische Erörterungen über den römischen Staat (1871), 12, supposes they were admitted by the Ogulnian law, 300 B. C.; Genz, Patr. Rom., 41, 62, places their admission not earlier than the institution of the Servian tribes and not later than the decemvirate, greatly preferring the latter date.

[4] Röm. Staatsr., iii, 13; Abriss, 5.

[5] *Ibid.* iii, 54 *et seq.*

[6] Röm. Staatsr., iii, 91.

[7] *Ibid.* iii, 63.

[8] *Ibid.* iii, 67 *et seq.*

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Although he knows well the weakness of the evidence offered by earlier writers, he adopts the hypothesis of an original patrician state, without attempting a systematic defence. Here and there in his works, however, he mentions some fact or condition which he would like to have considered proof. The following are the chief passages of this kind:

(1) The lack of right to the *auspicia*[1] and to the *imperium*[2] on the part of the plebeians proves that the patriciate was the original citizenship.

But we could as reasonably say, with reference to the auspices, that the two Attic *gentes* which furnished the sacred exegetes contained the only Athenian citizens.[3] The *auspicia*, as Soltau[4] has noticed, belonged to the *ius honorum*, as did also the *imperium;* hence they were both privileges of the nobility. In brief Mommsen's reasoning would make a governing nobility everywhere impossible.

(2) The cavalry were patrician; therefore the infantry must have been.[5]

With the same kind of reasoning we could conclude that because in the Homeric age of Greece chariots were used in war by nobles only, the infantry must also have been exclusively noble; whereas we know that the rank and file were common men. That the Roman army before Servius was similarly composed is supported not only by this and many other analogies, but also by the unanimous testimony of the sources. It is absurd, too, to assume that a small city-state like early Rome, engaged in constant warfare with neighbors, would not put into the field its entire fighting force above the condition of slaves. As in other primitive states the warriors naturally constituted the assembly and were the citizens.

(3) Of the sixteen local tribes named after *gentes* it can be proved that ten have the names of patrician *gentes*, and not one name is known to be plebeian. This is evident proof that from the beginning the patriciate was not nobility but citizenship.[6]

[1] Röm. Staatsr., i, 91, n. 1; *cf.* Lange, Röm. Altertümer, i, 261 *et seq.*

[2] Röm. Staatsr., iii, 77.

[3] *Cf.* Töpffer, Attische Genealogie, 177.

[4] Altröm. Volksversamml., 93.

[5] Röm. Staatsr., iii, 109.

[6] Röm. Forsch., i, 106 *et seq.* and n. 80.

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Any unprejudiced mind will discover at once that his premises prove no more than that at the time when these tribes were instituted the patricians were influential enough to give their names to ten, probably to all sixteen. In all the three cases mentioned, Mommsen reasons that because the patricians alone enjoyed the honors, privileges and influence usually considered appropriate to a nobility, they must therefore have constituted not the nobility simply but the whole citizen body.

(4) He identifies *patres* with *gentiles* and assumes that the primitive state was an aggregate of *gentes*, thus making the *patres* the only members of the state.[1]

These are not proofs but unsupported assumptions. The only connection of *patres* with *gentes* given in Latin literature is in the well known phrases *patres maiorum* and *minorum gentium*; and Cicero[2] makes it clear that these *patres* were senators. The phrase means senators from, or belonging to, the greater or lesser *gentes*. Furthermore it can be proved (1) that the patricians were not the only *gentiles*,[3] (2) that the *curia*, and hence the state, was not an aggregation of *gentes*.[4]

(5) We are informed, says Mommsen, (a) that the body of full Roman citizens consisted originally of a hundred families, whose fathers, the *patres*, regarded more or less concretely as the ancestors of the individual *gentes*, composed the Senate, and together with them their descendants, the patricians, made up the citizen body; or expressed in other words (b) patrician originally meant just what was afterward included under the term *ingenuus*.[5]

For (a) Mommsen cites those passages by which I have shown[6] that the Romans looked upon the original hundred senators as the fathers neither of the "citizen body" nor of the

[1] Röm. Staatsr., iii, 13.

[2] Rep., ii, 20, 35: "Duplicavit illum pristinum patrum numerum et antiquos patres maiorum gentium appellavit, quos priores sententiam rogabat, a se adscitos minorum." The connection shows that Cicero is speaking of two classes of senators distinguished by the rank of the *gentes* from which they respectively came.

[3] For instance, by the absence of all reference to patricianism in Scaevola's definition of the *gentilis;* Cicero, Top., 6, 29.

[4] *Supra*, p. 510 *et seq.* [5] Röm. Staatsr., iii, 14. [6] *Supra*, p. 499, notes.

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"full citizens," but of the nobility. His statement of the case is directly contradicted by the authorities he quotes. As regards (b) it has been sufficiently proved[1] that *ingenuus* when made equivalent to *patricius* most naturally signifies not "of free birth," but "of respectable, noble birth."

To the theory of an exclusively patrician *populus* the following objections may be summarily urged: (1) It is opposed by the unanimous testimony of the ancient authorities. (2) It rests upon a wrong explanation of the words *patres*, *patricii*, as designations of the nobles. (3) It is further propped up by reasons so feeble as to testify at once to its weakness, the more substantial basis having been overthrown partly by Mommsen himself. (4) The number of patricians is too small for the theory.[2] (5) It ignores the meaning of the word *plebs*, which evidently signifies "the masses," in contrast with the few nobles, and hence could not apply to a class gradually formed by the liberation of clients, or by the admission of foreigners. No one who holds the theory has attempted to show what these liberated clients were called when they were but a few compared with the patricians—before they became "the multitude." (6) It is contradicted by everything we know of Rome's attitude toward aliens. So far back as our knowledge reaches, she was extremely liberal in bestowing the citizenship, even forcing it upon some communities. Only when she acquired the rule over a considerable part of Italy did she begin to show illiberality in this respect. Down to 353 B. C. the citizenship thus freely extended included the right to vote.[3] (7) It assumes the existence of a community politically far advanced yet showing no inequalities of rank among the freemen—a condition outside the range of human experience. It aims to explain the origin of the social classes on purely Roman ground, ignoring the fact that distinctions of rank are far older than the city, and

[1] *Supra*, pp. 502, 503.

[2] *Cf. supra*, p. 513.

[3] That Caere was the first community to receive the *civitas sine suffragio* may justly be inferred from the expression "Caerite franchise," which designates this kind of limited citzenship. The general fact stated in (6) is further confirmed by the law which granted the right of extending the *pomerium* to those magistrates only who had acquired new territory for Rome; Gell., xiii, 14, 3; Tacitus, Ann., xii, 23.

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exist, at least in germ, in the most primitive communities of which we have knowledge.[1]

III. *The Comparative-Sociological View.*

As social classes belong to all society,[2] they cannot be explained by the peculiar conditions of any one community. The only scientific approach to this subject is through comparative study; the inferences of the ancient historians relative to primitive Rome are not to be displaced by purely subjective theories, but are to be tested by comparison with conditions in other communities of equal or less cultural advancement.

Distinctions of rank depend ultimately upon physical, mental and moral inequalities,[3] which differentiate the population of a community into leaders and followers.[4] The exhibition of

[1] Since the publication of the Staatsrecht, writers have made slight modifications or extensions of the conventional theory. Greenidge, in Poste, Gaii Institutiones, xix, suggests that the dual forms in Roman law may have as their basis a racial distinction between the patricians and the plebeians. A serious objection to this kind of reasoning is that if we are on the lookout for dualities, trinities and the like, we shall find them in abundance everywhere. It has been left to Ridgway, Early Age of Greece, i, 257, to discover of just what races the patricians and the plebeians were respectively composed. Undoubtedly race is a potent factor in history; but Gumplowicz, for instance, Rassenkampf (1883) has killed the theory by overwork.

Among the writers who have rejected the conventional view are Soltau, Altrömische Volksversammlungen (1880); Pelham, Outlines of Roman History (1893; reprint of his article on "Roman History," in the Encyc. Brit.); Meyer, Geschichte des Altertums, ii (1893).

[2] Meyer, Gesch. d. Alt., ii, 80; Featherman, Social History of the Races of Mankind, ii, 408; Hellwald, Culturgeschichte, i, 175; Barth, Philosophie der Geschichte, i, 382. It would be practicable by the citation of authorities to prove the existence of such distinctions in nearly every community, present or past, whose social condition is sufficiently known.

[3] Giddings, Principles of Sociology, 124; Tarde, Laws of Imitation, 233 *et seq.*; Fairbanks, Introduction to Sociology, 158; Grave, L'Individu et la Société, 23; Funck-Brentano, Civilisation et ses Lois, 71 *et seq.*; Caspari, Urgeschichte der Menschheit, i, 125 *et seq.*; Hellwald, *ibid.* i, 175, 177; Ross, Social Control, 80.

[4] Giddings, *ibid.*, 262; Ammon, Gesellschaftsordnung, 133 *et seq.*; Cherbuliez, Simples notions de l'ordre social à l'usage de tout le monde, 38 *et seq.*; Dechesne, Conception du droit, 36; Grave, *ibid.* 23 *et seq.*; Caspari, *ibid.* i, 133 *et seq.*; Harris, Civilization considered as a Science, 211; Lepelletier de la Sarthe, Système sociale, i, 329; Mismer, Principes sociologiques, 63 *et seq.*; Rossbach, Geschichte der Gesellschaft, i, 13 *et seq.*; Schurtz, Urgeschichte der Kultur, 385; Hittell, Mankind in Ancient Times, i, 228 *et seq.*; Maine, Early History of Institutions, 130; Seebohm, Tribal System in Wales, 139.

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physical strength and skill on the part of young men and of knowledge and wisdom on the part of the elders are often "the foundation of leadership and of that useful subordination in mutual aid which depends on voluntary deference."[1] In an age in which men were largely under the control of religion the possession of an oracle or skill in divination or prophecy might contribute as much to the elevation of an individual above his fellows.[2] Leadership, once obtained, could display and strengthen itself in various ways. In primitive society the strong, brave, intelligent man was especially qualified to take command in war. Success brought the chief not only renown but a large share of the booty and in later time acquired land. The same result might be obtained by other means than by war;[3] but in any case wealth and influence inherited through several generations made nobility.[4] Primarily grounded on ability, wealth and renown, this preëminence was often heightened by a claim to divine lineage or other close connection with the gods.[5]

There was evidently a stage of development—before the association of the nobles into a class—in which chieftains alone held preëminence. This condition is common in primitive society, as among the American Indians.[6] Among the Germans,

[1] Giddings, *ibid.* 262; *cf.* Arnd, Die materiellen Grundlagen . . . der europäischen Kultur, 444 *et seq.*; Frohschammer, Organisation und Kultur der mensch. Gesellschaft, 84 *et seq.*; Bastian, Rechtsverhältnisse bei verschiedenen Völkern der Erde, 20 *et seq.*; Spencer, Principles of Sociology, ii, 333, 335.

[2] Spencer, *ibid.* ii, 338 *et seq.*

[3] *Cf.* Rubino, Römische Verfassung und Geschichte, 183; Spencer, *ibid.* ii, 334 *et seq.*; Seebohm, Tribal System in Wales, 72.

[4] Aristotle, Politics, 1294, a 21 *et seq.*; Giddings, Principles of Sociology, 293 *et seq.*; Jenks, History of Politics, 30 *et seq.*; Grave, L'Individu et la société, 25; Combes de Lestrade, Elements de sociologie, 185; Schurtz, Urgeschichte der Kultur, 148, 385; Featherman, Social History of the Races of Mankind, see Index, s. Classes; Hittell, Mankind in Ancient Times, i, 228; Maine, Early History of Institutions, 134; Ginnell, Brehon Laws, 60 *et seq.*; Bluntschli, Theory of the State, 149; Vinogradoff, Growth of the Manor, rev. by Beard in POL. SCI. QUART., xxi, 165 *et seq.*

[5] Grave, *ibid.* 30 *et seq.*; Combes de Lestrade, *ibid.* 184 *et seq.*; Funck-Brentano, Civilisation et ses Lois, 68 *et seq.*; Spencer, *ibid.* ii, 348 *et seq.*; Schurtz, *ibid.* 150 *et seq.*; Featherman, *ibid.* ii, 128, 197 *et seq.*, 311; Letourneau, Sociology, 480 *et seq.*; Bastian, Rechtsverhältnisse, 8 *et seq.*

[6] *Cf.* Schurtz, *ibid.* 148.

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too, who had advanced somewhat beyond this stage, each chief, or lord, appears to have been noble, "less with reference to other noblemen than with reference to the other free tribesmen comprised in the same group with himself."[1] From Brehon law we infer that the Irish lords were individually heads of their several groups of kinsmen or of vassals;[2] and in Wales the nobles were a hierarchy of chieftains.[3] As soon as leadership became hereditary there arose noble families, in which the younger members were often sub-chieftains;[4] and finally through intermarriage among these families, as well as through the discovery of common interests, the nobles associated themselves into a class.

Among the ancient Germans,[5] the Greeks of the Homeric age,[6] and in some early Italian states[7] certain families had become noble, and others were on the way to nobility. For ancient Ireland the entire process can be followed. A common freeman enters the service of some chief, from whom he receives permission to use large portions of the tribe land.[8] By pasturing cattle he grows wealthy, becomes a *bo-aire* (cow-nobleman) and secures a band of dependants. Supported by these followers,

[1] Maine, *ibid.* 132.

[2] Maine, *ibid.*; Ginnell, Brehon Laws, 63 *et seq.*, 93 *et seq.*

[3] Seebohm, Tribal System in Wales, 134 *et seq.*

[4] As in Wales; Seebohm, *ibid.* 139; *cf.* the Inca grandees, who all claimed descent from the founder of the monarchy; Letourneau, Sociology, 479.

[5] Tac. Germ., 13, 3: "Insignis nobilitas aut magna patrum merita principis dignationem etiam adulescentulis adsignant." It is clear that the family of a youth who receives an office or dignity because of the merits of his ancestors is coming near to nobility.

[6] A certain man of illegitimate birth, hence of inferior social standing, through martial skill and daring becomes a leader of warriors, acquires wealth, marries the daughter of a notable, "waxes dread and honorable" among his countrymen, who elect him to a high military command by the side of their hereditary chief; the taint of his birth is forgotten; *Od.*, xiv, 199 *et seq.*; *cf.* Bernhöft, Röm. Königszeit, 123.

[7] Livy, x, 38, 7: "Nobilissimum quemque genere factisque," with reference to the Samnites; some were nobles by birth, others by prowess; *cf.* 46, 4: "Nobiles aliquot captivi clari suis patrumque factis ducti;" some of these captives were noble through their own prowess, others through that of their ancestors. The Samnite nobility was in the formative stage like that of the German nobility in the time of Tacitus.

[8] Maine, Early History of Institutions, 135 *et seq.*; Giddings, Principles of Sociology, 294 *et seq.*

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he preys upon his neighbors and, if successful, becomes in time a powerful noble.[1] After "a certain number of generations" he can no longer be distinguished from the blooded nobility.[2] Here is an instance of a common freeman's becoming noble through service to a chief. In like manner among the Saxons who had conquered England the ceorl who "thrived so that he had fully five hides of land," or the merchant who had "fared twice over the wide sea by his own means," became a thane; "and if the thane thrived, so that he became an eorl, then was he henceforth worthy of eorl-right."[3]

The thanes were the immediate companions of the king—his *comitatus*—and from their first appearance in English history they took rank above the earlier nobility of Saxon eorls, who were descended from ancient tribal chiefs. Thus the thanes as a nobility of newly rich corresponded to the cow-noblemen of an earlier time.[4]

In the way just described many rose from the lower ranks to nobility. In fact eminent authorities assert that the inferior nobles, especially of the middle age, were more often of servile than of free origin, as the common freemen were inclined to think it degrading to be seen among the *comites* of a chief.[5]

It has now been sufficiently established that even in the tribal condition people were differentiated into social ranks. We have traced the beginning of nobility to leadership and have found, in both ancient and mediæval society, new noble families forming by the side of the old. Social distinctions were well developed long before the founding of cities. When a community, whether a tribe or a city, is far enough advanced to begin the conquest of neighbors, "it has already differentiated into royal,

[1] *Cf.* Giddings, *ibid.* [2] Maine, *ibid.* 136. [3] Laws of Athelstan.

[4] Giddings, Principles of Sociology, 296; *cf.* Maine, Early History of Institutions, 141. Thus in the time of Tacitus the German youth of common blood who entered the *comitatus* of a chief had a fair opportunity to become noble; Germ., 13, 3–5; 14, 1 *et seq.* Among the Danes, too, some noble families were once peasant; Maine, *ibid.* 135.

[5] Brunner, Deutsche Rechtsgeschichte, i, 235 *et seq.*, 252; Maine, *ibid.* 138; Ammon, Gesellschaftsordnung, 135; Schurtz, Urgeschichte der Kultur, 148 *et seq.*; Bluntschli, Theory of the State, 131, 155; Tarde, Laws of Imitation, 237.

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noble, free and servile families."[1] This was true of Sparta. In her "the conquerors nevertheless, notwithstanding great differences among themselves, remain sharply separated in social function from the conquered . . . The conquerors became a religious, military and political class, and the conquered an industrial class."[2] Even in the case of Sparta, however, which is perhaps our best example of the exclusiveness of a ruling city, there is evidence of mingling between the conquering Spartans and the conquered Laconians before the former became exclusive.[3] In like manner there was much mixing of the invading "Aryans" with the natives of India—the more intelligent of the natives rising to the higher classes and the less gifted of the invaders sinking to the lower—before the crystalization of the castes.[4] We find the same mingling of conquerors and conquered in varying degrees in ancient Ireland,[5] in England under the Normans[6] and throughout the Roman empire in the period of Germanic settlements.[7] It becomes doubtful, therefore, whether a nobility was ever formed purely by the superposition of one community upon another. The effect of conquest was rather to accentuate existing class distinctions, and by a partial substitution of strangers in place of native nobles to stir

[1] Giddings, Principles of Sociology, 315; *cf.* Combes de Lestrade, Elements de sociologie, 185; Rossbach, Geschichte der Gesellschaft, i, 14. A nobility formed purely by conquest, if such indeed exists, must be rare, and can hardly be lasting; Schurtz, Urgeschichte der Kultur, 149.

[2] Giddings, *ibid.* 315; *cf.* Grave, L'Individu et la société. 32.

[3] Strabo, viii, 4, 4, 364; Aristotle, Politics, 1270, a 34 *et seq.*

[4] Schurtz, Urgeschichte der Kultur, 165.

[5] Grinnell, Brehon Laws, 145.

[6] Bluntschli, Theory of the State, 142; Freeman, Norman Conquest, iv, 11. There were nobles both in England and in Normandy before the conquest. After the battle of Senlac most of the English nobles submitted to William, and were allowed to redeem their lands; Freeman, *ibid.* iv, 13 *et seq.*, 36 *et seq.* It was only in punishment for later rebellion that they lost their holdings, and some English thanes were never displaced; *cf.* Powell, in Traill, Social England, i, 240.

[7] The most violent and oppressive Germanic invaders are supposed to have been the Vandals, and yet they doubtless retained for the administration of the government the trained Roman officials; Hodgkin, Italy and her Invaders, ii, 263. The Ostrogoths were more liberal in their treatment of the Romans (*ibid.* iv, 250, 271, 282), and the Franks still more liberal; Brunner, Deutsche Rechtsgeschichte, ii, 202.

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up antagonism between the classes. Even where the differences between the social ranks seem to be racial, it would be hazardous to resort to the race theory in explanation; for such a condition could be produced in the course of generations by different modes of life, education, nurture and marriage regulations of the nobles and commons respectively.[1]

The study pursued thus far will enable us to understand how there came to be social classes at Rome before the beginning of conquest. But for a long time after the Romans began to annex territory we may seek in vain for a distinction between conquerors and conquered, like that which we find in Laconia. We are forbidden to identify the *plebs* with the conquered and the patricians with the conquerors by many considerations mentioned above—for instance, by tradition, by the derivation of several patrician *gentes* from various foreign states, by the fewness of the patricians and by the fact that the latter show no differentiations of rank, such as we find among the conquering Spartans; they were not a folk but a nobility pure and simple. We are to regard Rome's early annexations of territory and of populations not as subjugations, but as incorporations on terms of equality. The people incorporated were of the same great folk, the Latins, or of a closely related folk, the Sabines. Accordingly they were not reduced to subjection, but were admitted to citizenship, to the tribes and the *curiae*, and their nobles were granted the patriciate.[2] Only communities of alien

[1] Featherman, Social History of the Races of Mankind, ii, 354; Tarde, Laws of Imitation, 238, n. 1, 239; Hellwald, Kulturgeschichte, i, 175 *et seq.*; Schurtz, Urgeschichte der Kultur, 149; *cf.* Demolins, Comment la route crée le type social.

[2] The idea that the primitive community is essentially illiberal with its memerbship, especially propagated by Fustel de Coulanges, Ancient City, is erroneous. For the mingling of conquerors and conquered, see *supra*, p. 524, notes 3 and 4. On the ethnic heterogeneity of states in general, see Gumplowicz, Rassenkampf, 181. The laws of Solon granted citizenship to alien residents who were in perpetual exile from their own country, or who had settled with their families in Attica with a view to plying their trade; Plut. Sol., 24. Under his laws, too, a valid marriage could be contracted between an Athenian and an alien; Hdt., vi, 130. The Athenians, like the Romans, believed that many of their noble families were of foreign origin. In Ireland "strangers settling in the district, conducting themselves well, and intermarrying with the clan, were after a few generations indistinguishable from it;" Ginnell, Brehon Laws, 103. Nearly the same rule holds for South Wales; Seebohm, Tribal System in Wales, 131.

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speech, like the Etruscan, or distant Italian communities, like the Campanian, were ordinarily given the inferior *civitas sine suffragio*; and this restricted citizenship does not appear in history before the middle of the fourth century B. C.

The analogies offered in this paper are useful if only for proving that the conditions they illustrate are not impossible for early Rome. By similar comparative study it would be practicable to illustrate in detail the statements of our sources as to the organization of the *plebs*, as well as of the patricians, in tribes and *curiae*, the participation of the clients and plebeians in war and in politics and the deterioration of the rights of the common freemen through the strengthening of the aristocracy —all of which are rejected by eminent modern historians who merely imagine them incompatible with primitive c[illegible]tions or with a rational theory of constitutional developmen[illegible] The inquiry has been pursued far enough, however, to in[illegible]te that from a comparative-sociological point of view the con[illegible]ion of early Rome handed down to us by the ancients, whate[illegible] may have been their ultimate authority, is sound and consist[illegible] and to suggest that for the period before the passing of the h[illegible] tensian law, which completed the equalization of social ranks, the history of the constitution and of political struggles should be so restated as to make it accord better with the ancient view.

GEORGE WILLIS BOTSFORD.

To the Germans before their settlement within the empire the idea of an exclusive community must have been foreign; for as yet the individual was but loosely attached to his tribe. Persons of many tribes were united in the *comitatus* of a chief; the two halves of a tribe often fought on opposite sides in war; a tribe often chose its chief from another tribe. Intermarriage among the tribes was common, even between Germans and Sarmatians. A single tribe often split into several independent tribes, and conversely new tribes were formed of the most diverse elements; Seeck, Geschichte des Untergangs der antiken Welt, i, 209, with notes; Kaufmann, Die Germanen der Urzeit, 136 *et seq.* Under these circumstances the primitive German community cannot be described as exclusive. In like manner our sources unanimously testify to the liberality of early Rome in granting the citizenship to strangers. It is no longer possible to oppose to this authority the objection that such generosity does not accord with primitive conditions.

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REVIEWS

Russia and its Crisis. By PAUL MILYOUKOV. Chicago, The University of Chicago Press. 1905.—xiii, 589 pp.

The name of Professor Milyoukov has become quite familiar to American readers. He is known as one of the leaders of the Constitutional Democrats. But the Russian thinks of Pavel Nikolaevitch Milyoukov not as a politician primarily but rather as one of the ablest and most learned living Russian historians. His many monumental works on the reforms of Peter the Great, the history of Russian culture, Russian historiography, *etc.*, place Professor Milyoukov among the foremost historians of our age. It is therefore no small privilege for the English-reading public to possess in English a book on Russia written by so great an authority.

Since the beginning of the Russo-Japanese war a number of books have been published discussing Russian affairs written by newspaper men and by more or less well-informed travelers. These books have no scientific value whatever, and the English-reading public has had to rely for sound information about Russia on the well-known works of Wallace and Leroy-Beaulieu. Milyoukov's book is not particularly well written, and in the opinion of the reviewer is ill-proportioned; yet it is beyond doubt the best, most instructive and most authoritative work on Russia ever published in English.

The "crisis" to which the title refers is not the crisis of today. Parts of the work went to the printer as early as 1903. The book therefore does not deal with the present moment. Milyoukov, however, discusses so thoroughly the origin and development of the chief factors of the present crisis that the work is of permanent value and at the same time most illuminating even so far as the happenings of the day are concerned.

The volume is divided into eight chapters. The first contains a comparison of Russia and the United States. The other chapters tell us about the origin and fate of national self-consciousness and nationalistic theories in Russia, the religious tradition, the political tradition of the government, liberalism and socialism in Russia, and the "Crisis and Urgency of the Reform," as the last chapter is entitled.

In these few chapters all the important elements of the Russian

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tragedy are dealt with exhaustively and objectively. Professor Milyoukov introduces the reader to the two Russias: that of Plehve, the official Russia, which regards the country as a conquered land; and the other Russia struggling for freedom. To the American, accustomed to conceive of the government only as representing the will of the people, this Russian dualism, the two Russias in one territory, is something difficult to comprehend. How great is the antagonism between the government and the people is illustrated by the following quotation:

> One of the saddest results of the abnormal conditions of Russian political life is that public disasters are needed to bring about periods of political revival. The Crimean defeat we have mentioned as the signal of the era of the great reforms of Alexander II. The famine of 1891 started a movement—Stepniak's foresight was clear and true—which has not yet ceased, though it has not found a satisfactory issue. No wonder, then, that Russian patriots sometimes are brought so far as to look forward to some fresh disaster to rescue Russia from the deadlock in which she now is. One can imagine how great the political tension must be in order that this mode of thinking, which seems so utterly unpatriotic, may serve as a distinctive feature of the highest patriotism in Russia. [A footnote informs us that these lines were written before the Russo-Japanese war began.]

Of course it is under very unusual and extreme circumstances that enlightened Russian patriots have prayed for national disaster. But under all circumstances an abyss divides the patriotism of the "intelligencia" from the official governmental "patriotism" and nationalism.

The official nationalism is so important an element in Russia's political life that a whole chapter is devoted to the subject, where the reader will find the evolution of the slavophile doctrine down to the Pobedonstseff-Leontyeff-Alexander III theory, program and policy.

Interesting and enlightening to the American reader will be Milyoukov's chapter on "The Religious Tradition." The author gives a very scholarly and vivid picture of the character and history of the Russian national church, of dissent, of the origin and development of the various sects. The author is of the opinion that Russia is on the eve of a religious reformation.

The chapter devoted to the political tradition deals proportionately a little too much with ancient history and the comparative history of feudalism, but it gives a good idea of the origin of Russian autocracy and sketches its development down to the period of the present reigning czar. This last stage might be characterized as autocracy gone mad—its *reductio ad absurdum*. Very instructive is the chapter on

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liberalism. It gives us a brief history of Russia's intellectual development in the nineteenth century. The reviewer can not agree with Professor Milyoukov's criticism of Miliutin's and Cherkassky's influence on the abolition of serfdom. There is no reason to find fault with the course of the government in paying little attention to the reactionary drafts of the emancipation law as worked out by the provincial landlord committees (pp. 266–267). This, however, is an unimportant detail. The history of Russian liberalism is followed by a remarkable chapter entitled "The Socialistic Idea," which contains answers to many questions in which the American reader is interested. This chapter would settle many curious current notions about the "Mir," "nihilism," and different types of Russian revolutionary socialism. In the last two chapters the reader will find a sketch of the inner political situation up to Red Sunday.

Since the memorable slaughter of the peaceful workingmen who went to their Czar with a petition, much has changed in Russia. Liberties have been granted and withdrawn, massacres openly organized with the knowledge and help of the government, whole country districts devastated and covered with ashes by punitive expeditions, a Duma convoked and dispersed and political self-consciousness propagated and carried to the home of the poorest toilers in country and town. The printing press has not been able to keep pace with the rapid tempo of events and the spread and development of political parties, tenets and ideas throughout Russia. Professor Milyoukov gives naturally no information about the eventful year that has passed since the publication of the book. But the events of the day will be more intelligible to those who have read this admirable book.

VLADIMIR G. SIMKHOVITCH.

COLUMBIA UNIVERSITY.

A History of Egypt. By JAMES HENRY BREASTED. New York, Charles Scribner's Sons, 1905.—xxix, 634 pp.

For the first time we have in one volume a history of Egypt worthy of the name; a history based on the latest results of archaeological research, written by a man whose knowledge is wide and accurate, whose conceptions of human society are a product of comparative study and the scientific spirit and who has, withal, the literary gift. It is a volume to which the student can turn for information and which the average intelligent man can read for pleasure, as he can read his Gibbon or his Parkman.

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The amazing growth within the last twenty-five years of our knowledge of the earliest civilizations is vividly brought home to one who turns Professor Breasted's pages and compares them with any important work which, no longer than a decade or so ago, was accepted as "advanced" within its class. There is no better proof that our acquaintance with any ancient people has emerged from a speculative stage and taken on the quality of reality than we have when a certain sense of queerness disappears from the subject-matter. So long as Egyptian civilization awakened in the historical student a feeling of something apart and strange, we knew that we were not yet in close touch with the vital facts. As depicted in Professor Breasted's pages, Egyptian life has ceased to be queer. It is like the human life that we know. Social conditions, industry and politics present familiar aspects. The history of the people of the Nile valley unfolds in a systematic evolution like the history of the people of the valley of the Seine or of the Thames. If we did not happen to know that it is the history of a time long ago, we could easily imagine that we were reading of scenes and events in any generation before the invention of the steam engine.

Professor Breasted's survey is comprehensive. The introduction, book i, includes a careful study of the land, of the sources of our knowledge of its population and history and of that earliest Egypt of the prehistoric period which is of deep interest to the anthropologist. In book ii we have a remarkably complete picture of the Old Kingdom, in which civilization was born, of its religion, its early industry and art, the early social order and the political system.

That early kingdom of the north declined, and with the rise of Thebes and the Middle Kingdom a feudal age was ushered in. As the Old Kingdom was essentially like primitive kingdoms everywhere, in Europe and in Asia as in Africa, so was the feudal age in Egypt essentially like the feudal age in Europe and like the feudal age that has but recently passed away in Japan. This intensely interesting subject is the chief theme of Professor Breasted's third book.

In book iv we follow the Hyksos invasion, the subsequent recovery of Thebes and the expulsion of the Hyksos and the rise of the Empire. Admirable is the treatment of the transformation of society and religion by the imperial evolution, with its policy of militarism and its centralized administration. The student of sociology would not waste his time who should read, in connection with his perusal of books v and vi, Mr. Spencer's exposition of the evolution of political institutions, especially his chapters on political integration and "The Militant Type of Society." The real history of Egypt, as we now know it, is an exceedingly specific verification of Mr. Spencer's broad generalizations.

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In book vii we enter upon the period of decadence, the fall of the empire and the supremacy, first, of the Libyans, then of the Ethiopians, and, finally, of Assyria. Book viii, on "The Restoration and the End," traces the history through the final struggle down to the creation in the East of the great empire of Persia.

The student will look in vain for any other one work so well adapted as this volume is to give him his first broad ideas and impressions of the beginnings of civilization and of the great general tendencies of social evolution which have been exemplified in the development of all peoples, ancient and modern. For such purposes this is a foundation book. It presents a remarkably complete picture of the social evolution of one great people, in some respects the greatest people of history, from the moment of its emergence from the tribal life of barbarism, through every stage of its religious, economic and political development, until its final disintegration. Acquainted with this history, the student has a basis for comparative study. He is equipped with facts and with concepts of forms and tendencies which he can carry with him into any field of historical research and into the broad realm of sociological generalization.

FRANKLIN H. GIDDINGS.

The Political History of England. In twelve volumes, edited by HUNT and POOLE. Volume II, 1066–1216. By GEORGE BURTON ADAMS. New York. Longmans, Green & Company, 1905.—x, 473 pp.

Messrs. Hunt and Poole have undertaken the editorship of a new political history of England, summing up the results of recent scholarship so far as they bear upon the narration of political events. Though they state in their preface that "notices of religious matters and of intellectual, social and economic progress will also find place in these volumes," chronological and political concepts dominate the selection, arrangement and presentation of the facts. In short, this work does not depart essentially from the devices of the older historians such as Lingard. The fertile and suggestive methods of economics and sociology have made practically no impression on the designs of the editors. Although this may be a matter for regret, their enterprise must be judged according to the schemes of the projectors.

The second volume of the series, covering the period from the Norman Conquest to the death of King John, by Professor George Burton Adams, is a discriminating, accurate and for the most part rigidly

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objective piece of work. With a sound sense of values, the author has weighed and marshalled the conclusions of many scholars in his field; he has shown the mature judgment of an independent worker in the consideration of his materials; and, despite hampering and artificial chronological limitations, has presented the whole in a clear and measured fashion. His characterizations of men and descriptions of events are tempered by a steady and persistent reference to facts which gives a uniform sobriety to his style, but inspires confidence in his conclusions.

The interest of the author, however, is by no means wholly confined to political affairs, for woven into the chronological narrative there are sections covering practically every important institutional question of the period. Anglo-Norman feudalism, the state-church controversies, the administrative and constitutional measures of Henry I and Henry II and the issues involved in the quarrel between John and the barons are all discussed with the fullness which the compass and nature of the volume admit. Unfortunately, the brevity of the treatment of certain topics such as the scutage has prevented the adequate exposition which their technical difficulties require. The book as a whole, however, is admirably proportioned and the studious distribution of emphasis shows that brevity has not meant haste. On institutional as on other topics, the purpose of the writer to give the mature results of recent scholarship is consistently maintained. Where the decided opinions of recent controversialists are admitted as evidence, they are for the most part accepted with that reserve and caution of which Dr. Stubbs was undoubted master. There is no attempt at definiteness and finality where evidences do not warrant. In other words, it was Professor Adams's function in the preparation of this volume not to break new paths but to reflect the traditional, conservative and scholarly views on the period as they now stand, and he has successfully accomplished his task.

Notwithstanding this fact, there seem to be several points in Professor Adams's conclusions which are open to question. We are told (p. 18) that "political feudalism" had never grown up in the Saxon world, and that we can hardly affirm with any confidence that it was in process of formation in England before the Conquest. This "political feudalism" is characterized "as that form of organization in which the duties of the citizen to the state had been changed into a species of land rent." This seems to assume that there were "state" and "civic duties" in some modern sense even before the Conqueror's day. Now if we leave aside all modern theory and terminology and fix our attention on the concrete relationships and practices which made up Anglo-Saxon "institutions" and then compare them with the relationships

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and practices which were the component parts of Anglo-Norman feudalism, it is hard to discover any fundamental differences in kind. Moreover, Professor Adams appears to overlook the fact that our scanty materials on Anglo-Saxon feudalism will not permit anything like a definite picture of that system in either its economic or its political aspects (if such sharp distinction be allowable). On the whole it would be best to avoid as far as possible the use of the terms of modern law and political science in the discussion of feudal institutions and to confine ourselves to a description of concrete practices; we shall then be nearer to reality.

Professor Adams implies (p. 40) that the bishops had no independent jurisdiction over secular persons prior to the Conquest. This rests on the assent which absence of authority gives and overlooks some slight evidence to the contrary (Stubbs, vol. i, p. 254 and Böhmer, p. 40). His interpretation of William's decree separating spiritual and temporal jurisdiction apparently does not go beyond the conclusions of Dr. Stubbs and consequently leaves much that is indefinite. The translation of the term "hundret" as hundred court leaves untouched certain aspects of the problem itself. According to II Canute 18, the bishop exercised in the shire court the same authority as III Edgar 5 gives him in the hundred court. If William's ordinance cut away only the jurisdiction in the hundred court, what became of the county court jurisdiction? Does not the following clause, from the decree, "nec causam quae ad regimen animarum pertinet ad judicium secularium hominum adducant," imply the extension of the separation to the county as well as the hundred court? Moreover the word "hundret" may mean "court" in general. This is not put forward as a solution but rather as a suggestion on some unsolved problems connected with the decree.[1]

Our author believes that the men of the vill probably attended the Anglo-Saxon county court (p. 67) in spite of the fact that the only evidence for it is from a twelfth century source of questionable value which does not even regard it as the normal but as the exceptional practice (*Leges Henrici Primi*, vii, 7).

Had Vinogradoff's *Growth of the Manor* come to hand before he sent his volume to press, Professor Adams would doubtless have modified his rather strict limitation of the Doomsday survey to the single

[1] Since this review was in type the late Dr. Stubbs's *Lectures on Early English History* has appeared, and on p. 89 it is held that the writ applied to both hundred and county courts.

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definite purpose of taxation. The distinguished Russian author points out that there was another very important design in the preparation of the Survey—that of providing the king's officers with exact clues to the personal nexus of the different tenements. The usual severe judgment is rendered on William Rufus (p. 80). This rests on the accounts which were written for the most part by his enemies, who opposed that absolute power which Professor Adams (p. 56) admits was the explanation of English liberty. Perhaps William Rufus may yet be rehabilitated. The election story about King John (p. 394) does not seem worth very serious consideration in view of the practice, not only in the case of John himself, but of all other English kings. Moreover we must keep the modern content of the words "elect" and "choose" out of our translations. According to the Anglo-Saxon chronicler (An. 1017) "Canute was *chosen* king!"

Some exceptions may also be taken to Professor Adams's treatment of Magna Carta. He rightly declares that the document is feudal from beginning to end, but contends that some of the provisions of our civil liberty are present almost in their modern form. He enumerates these provisions: "That private property shall not be taken for public use without just compensation, that cruel and unusual punishments shall not be inflicted nor excessive fines imposed and that justice shall be fair and free to all." Now if we carefully analyze out the concrete modern practices covered by these general principles and also study the history of these concrete practices in England since Magna Carta we shall doubtless find that neither in content nor in effect did they have the modern meaning. For example the Charter did not extend fair and free justice, such as it was, to "all" or even half of the nation. The villeins who composed probably three-fourths of the nation were excluded from the benefits of these principles because their "justice" was meted out for the most part in courts not affected by the Great Charter. Furthermore the Charter did not extend to the villeins compensation for their horses and carts taken for transport duties (Clause 30). Though the views of Mr. Jenks and Mr. McKechnie came too late for his use, Professor Adams's usual caution should have led him to qualify his terms more rigidly, especially in view of the fact that he is writing for laymen in law and history.

Finally it seems to the present reviewer that Professor Adams has given far too much importance to Clause 61 of the Great Charter, which appears to him to recognize something like a legal insurrection to maintain rights as "the true corner-stone of the English constitution." This clause was not repeated in the confirmation of the charter

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in 1216, and surely it cannot be held that insurrection even to make the king observe the law was ever a part of the legal doctrines or practices of England. This savors of the old Whig theory of an original contract and an original law which the people could legally force the king to observe. This is unhistorical because it ignores the actual course in the development of the law and, above all, the facts that the law is in final analysis the embodiment of concrete interests, that concrete interests arise with the changing forms of economic and social life and that however they may be clothed in the garb of "precedent" or of "constitutional" or "natural" law, their assertion constitutes innovation and revolution in so far as it wrests from the sovereign or predominant class a portion of their privileges or prerogatives. The "right" of the English people to coerce their sovereign is in reality nothing more than the "right" which all people have to assert and realize their interest—that is the "right" of desire, determination and might. This, however, is theory, and does not in any way invalidate Professor Adams's service to students of English history.

CHARLES A. BEARD.

Civil War and Reconstruction in Alabama. By WALTER L. FLEMING, PH. D. New York, The Columbia University Press, 1905. 805 pp.

Ever since the disgraceful downfall of the policy of Reconstruction, its authors and supporters have manifested a feverish anxiety to cover over the whole period in question with an act of oblivion, admonishing the coming historian, with finger on lip, somewhat in this wise: "Our country, right or wrong, you know. Her errors, pass over in silence. Her paroxysyms of madness or folly, tell not to posterity. Why wash the dirty linen of the nation in public? The horrors are over and gone. Why disinter the dead past to offend the nostrils of the living?"

Not so, we protest. The men who forced unqualified negro suffrage and white disfranchisement on the subjugated states of the South ought not to escape the condemnation of history by smothering their shame in apologies and endeavoring to hide the consequences of their misdeeds by appeals to the love of country. And the great merit of the book before us is that it renders all such efforts forever vain. With impartial but unsparing hand the author lays bare the transcendent iniquity perpetrated on one of these states by the two-thirds majority of the Congress of the United States under the forms of law. And he does his work in such fashion—every questionable statement backed by

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a wealth of authority placing it beyond dispute—that it cannot be hidden and will be read.

A government was forced upon the state of Alabama under which every adult male negro—just emancipated and but half civilized—was given the right to vote and every white man who would not swear to accept not only the civil but the political equality of the negro was disfranchised; and this book shows how it was done. In the first place, the military ruler for the time being divided the state into forty-four election districts and appointed for every one a board of registration, consisting of two whites and one negro, of the following description:

> Since each had to take the "iron-clad" test oath, practically all native whites were excluded, those who were on the lists being men of doubtful character and no ability. There were numbers of Northerners. For most of the districts the white registrars had to be imported. It is not saying much for the negro members that they were much the more respectable part of the board . . . [p. 488].

The registrars were paid so much per head and mileage "to hunt up voters" and persuade them to register. They were empowered to revise the lists and add to or strike off such names as they thought proper (pp. 489, 491). The first registration showed: whites, 61,295; blacks, 104,518; total, 165,813; black majority, 43,223. Normally, according to the census of 1866, there were 108,622 whites over twenty-one years of age and 89,663 blacks—a white majority of 18,959. Consequently, over 47,000 whites were disfranchised or failed to register and there was an over-registration of blacks of more than 14,000 (p. 491, note). The election for delegates to a convention to frame a constitution lasted four days—October 1–4—"the first time the late slaves were to vote, while many of their former masters could not." And the author delineates the process. Orders were sent to the plantation negroes to go and vote; "if they did not they would be reënslaved and their wives made to work on the roads and quit wearing hoop skirts." Threats of punishment were sent out from headquarters if they did not obey. "The negroes came into the city by thousands in regularly organized bodies, under arms and led by the League politicians, and camped about the city waiting for the time to vote. . . . They did not know, most of them, what voting was." At another place,

> The negroes were driven to town and camped the day before the election began. There was firing of guns all night. Early the next morning the local leaders formed the negroes into companies and regiments and marched them around with shot guns, muskets, pistols and knives to the court house.

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Three thousand of all ages from fifteen to eighty. No whites were allowed to approach. When drawn up in line, each man was given a ticket . . . and no negro was allowed to break ranks,

until the ticket was voted. In another county, "the Loyal League officers lined up the negroes early in the morning and saw that each man was supplied with the proper ticket. Then the command 'Forward, march!' was given, the line filed past the polling place, and each negro deposited his ballot." Twice more during the day "a bugle blew to repeat the operation" and the negroes present voted again. "Anyone voted who pleased and as often as he pleased" (pp. 514, 515). "The registration lists were not referred to except when a white man offered to vote." "One negro at Selma held up a blue [Conservative] ticket and cried out 'No land! no mules! no votes! Slavery again!' Then holding up a red [Radical] ticket he shouted: 'Forty acres of land! a mule! freedom! votes! equal of white man!'" (p. 515). "Another darkey was told to put the ballot in the box. 'Is dat votin?' 'Yes.' 'Nuttin more, master?' 'No.' 'I thought votin was gittin sumfin.' He went home in disgust" (p. 516). For the convention and for delegates 90,283 votes were cast—whites 18,533, blacks 71,730. Against the convention but 5,583 were cast, all white. 37,159 registered whites failed to vote, and (what is much more astonishing, considering the efforts of the Loyal League) 32,788 registered blacks (p. 491). Out of the one hundred delegates elected, but two were Conservative, so-called (p. 516). The ninety-eight Radicals "were a motley crew, white, yellow and black. The Freedmen's Bureau furnished eighteen or more. There were eighteen blacks." Thirteen registrars had certified to their own election. "No pretence of residence was made by the Northern men in the counties from which they were elected;" several had never seen them,

a slate being made up in Montgomery and sent to remote districts to be voted for. Of these Northern men or foreigners, there were thirty-seven or thirty-eight . . . The native whites were for the most part utterly unknown . . . Of the negro members two could write well and were fairly well educated, half could not write a word, and the others had been taught to sign their names and that was all (pp. 517–518).

This "Black Crook" convention, as it was called in derision (p. 491), managed in a month to frame a constitution which was ordered to be submitted to the voters on the fourth and fifth of February, 1868 (p. 492). Since the act of Congress required for a valid ratification that at least one-half of the registered electors must have voted one way

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or the other at the election, when the revision of the lists was made by the registrars, the whites resolved to swell the registration to the limit, so that they might defeat the constitution by staying away from the polls. Accordingly, there was an increase in their number of about 14,000, while the number of the blacks, by the striking off of names for which no radical had the face to stand sponsor, was decreased about 9000—the total revised registration being about 170,000 (pp. 538–9). These disclosures spread alarm among the partisans of the constitution and they employed the most desperate means to bring out, as nearly as possible, the entire registered negro vote, amounting now to but ten thousand more than the requisite one-half of the total registration. In the first place, they extended the period of the election from two to four days; and, a storm coming on the first day, instructions were sent out to keep the polls open until the close of February 8 and to receive the vote of any person who had registered anywhere in the state. Indifferent black men were driven to the polls.

> Many negroes voted rolls of tickets . . . They voted one day in one precinct and the next day in another, or several times in the same place . . . Hundreds of negro boys voted . . . The sick at their homes sent their proxies by their friends and relatives. In one case, Radicals voted negroes under the names of white men who were staying away [p. 540].

Notwithstanding these outrages, the constitution failed of ratification. But little over 71,000 votes were cast altogether—all but about 1000 for ratification—13,000 short of one-half the total registration. Only about 6000 whites voted at all. And, what was ominous of the future, the black vote was at least 15,000 behind the registration; a falling off caused, as our author states, by "the chilling of the negro's faith in his political leaders because of their broken promises about farms, *etc.*;" by the disgust of the better class with carpet-baggers and scalawags and by the persuasions of their old masters (pp. 541–2).

This humiliating result was in due course reported to the Congress by General Meade, the military commander of the district. "I am satisfied," he said, "the constitution was lost on its merits;" "was fairly rejected by the people." "The election had been quiet," he further said, "no disorder of any kind" (p. 543). The radical leaders in both Houses were greatly chagrined; but, at first, they recoiled from flying in the face of their own act. Even "Old Thad." acknowledged "that to admit the state against her own law . . . would not be doing justice in legislation." Nevertheless, he subsequently reported a bill for the admission of the state with five others, which was passed by the

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House. Trumbull reported it to the Senate with Alabama stricken out. Wilson moved to reinsert the state on the ground that "she was the strongest of all the states for the policy of Congress and it would be unjust to leave her out." Sherman said: "It was absolutely necessary to admit Alabama in order to settle the Fourteenth Amendment before the presidential election." The state was reinserted. The bill was passed. Africanized Alabama was dragged into the Union against the consent of a majority even of her packed electorate; to say nothing of the unanimous protest of the intelligent and property-holding classes of her citizens.

To plead high patriotic motives on behalf of the doers of this foul deed is idle. The debauchery of the elective franchise, the degradation of representative government, the defilement of one of the states of the Union were as nothing to them, provided the outcome of the process was the intrenchment of their party more firmly in power.

DAVID MILLER DEWITT.

KINGSTON, N. Y.

The Domestic Slave Trade of the Southern States. By WINFIELD H. COLLINS. New York, Broadway Publishing Co., 1904.—154 pp.

In seven short chapters the author of the monograph under review discusses the following topics: the foreign slave trade of America; the development and extent of the domestic slave trade; the kidnapping of free negroes; the breeding of negroes for sale, and the state laws relating to the domestic slave trade. The book is based mainly upon the accounts of anti-slavery travelers and the material collected by the *Liberator* relating to the slave trade. The value of much of this material is extremely doubtful, but Mr. Collins seems to have been aware of this, and his judgment has saved him from the absurdities usually committed by those who endeavor to write from such sources. Sometimes the statistics given are conflicting, and no attempt is made to explain the variations. The census statistics, however, are used to good effect. There are numerous typographical errors, and often names of authors and books are given incorrectly.

The causes of the development of the domestic slave trade are clearly set forth. These were the abolition of the foreign slave trade, expansion to the West, the growth of the cotton industry and the industrial decay of the border slave states. Before 1820 the trade was of slight extent. Between 1820 and 1830 the selling states were Virginia, Mary-

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land, Delaware, North Carolina, Kentucky and the District of Columbia. During the next ten years South Carolina and Missouri were added to the list of selling states. Slavery was thus pursuing its natural and inevitable course toward extinction in the border states. It is a fact worth noting that nearly all the slave states before the thirties and forties had stringent laws against the importation of slaves for sale. These laws were repealed by the buying states as the cotton plant spread over the South and abolition agitation over the North, but several of the slave states had prohibitive laws until the last.

The discussion of the extent of the slave trade is of particular interest. After a study of the census statistics the author comes to the conclusion that between 1820 and 1860, 735,000 slaves were carried to the lower South from the border states, and of these 296,000 were sold, the remainder being carried by immigrating owners. The decade 1820–1840 was the period of greatest trade, the sales averaging 10,600 per year. A noticeable fact is the great difference between the price of slaves in the border states and in the lower South. Any slave trader could soon make a fortune.

Mr. Collins disposes of the tradition about the breeding of slaves in the border states for sale to the South. In the first place it would not pay—a good five-year-old horse was worth as much as an eighteen-year-old negro and cost less per year to keep up. Secondly, had the selling states been breeding for sale, the census should show a larger proportion of children to adults in these states (since the slaves sold were usually adults) than in the buying states. The census shows the reverse is true. The fact is only a part of the surplus increase was sold South. The planter in the border states had more slaves than he knew what to do with—he was often eaten out of house and home by them. There was no profitable work for them to do. John Randolph predicted that the time would come when the "masters would run away from the slaves and be advertised by them in the public papers." Several important points, in this connection, are left undeveloped; but on the whole, the discussion of the economic and social hindrances to the breeding of slaves for the market is quite satisfactory.

WALTER L. FLEMING.

WEST VIRGINIA UNIVERSITY.

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The Foundations of Sociology. By EDWARD ALSWORTH ROSS. New York, the Macmillan Company, 1905.—xiv, 395 pp.

In this volume the author of *Social Control* has made a thorough and searching inspection of the fundamental masonry of sociology up to date. He finds that the foundations have been laid not in the shifting sand but in scientific rock. The chapters have a varying value, but on the whole are fine pieces of analysis and criticism. There is a strength and breeziness and homeliness of style which suggest the great Western environment of our country. There is a simplicity of expression and clearness of statement of which sociology has frequently stood sorely in need. The book is a series of essays. They are by no means unrelated, but it is of course difficult to make of them a scientific unity. Nevertheless it would have been easy to have placed chapter four, upon the unit of investigation, and chapters five and six, upon the various social groupings, before chapter three, which deals with the social laws that are slowly coming to light as a result of the study of process and grouping. So the tenth and eleventh chapters, on the causes of race superiority and the value rank of the American people, are important, but in the way of addenda to the preceding contents of the book.

A preliminary inquiry into the scope and task of sociology convinces the author that there is rapidly forming one master science of social life. The relation of this master science to certain of the social specialisms is discussed. Particularly is it made clear that, for light upon many questions, economics must cross the frontier into sociology. One might go further, I think, than the author seems anywhere inclined to go and defend fairly the original and the increasing subordination of the true economic motive to the social instinct. Certainly that higher product, social intellectualism, is everywhere winning in our time the battle against economic materialism. The mind of the many is overcoming economic greed.

I do not think that Professor Ross's conclusion with respect to the unit of investigation in sociology is so happy or so sound as most of his conclusions are. He rightly insists that this unit has often been too large, that it can not be a process or a product, that we must select a simple relation or interaction. But he lends aid and comfort to the notion that sociology may have several ultimates as units of investigation and not one, as in biology, for example. He avers that we can not take the individual as our unit unless we rob anthropology of its unit. Why should not anthropology and sociology have the same unit, and psychology, too, for that matter? The psychologist is particularly

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concerned with the individual states of consciousness, the sociologist with social states of consciousness and the anthropologist—within his sphere—is concerned with both the individual and the social states. The anthropologist studies man in his individualistic aspect as an animal with certain mental and physical characteristics, but no small part of his interest is centered in the sociological description of primitive peoples. Sociology proper builds upon anthropology and psychology, but follows in their course of evolution the developing social states of consciousness. Everywhere, for sociology, the potentially social mind or the actively social mind of the individual is the unit of investigation. The most elementary thing which the sociologist considers is the interaction of mind in its entirety with mind.

A carefully critical discussion of the mob is carried in the next chapter into a study of other forms of association, the mass meeting, the deliberative assembly, public opinion. Professor Ross makes it admirably clear that the analogy of the crowd is often unsafe, that the possibilities of rational control are far greater in the higher groupings. If the group never comes together in close physical contact, or if, coming together, it periodically breaks up, there is time for rational inhibition to intervene and do its perfect work. We are led to see that society is not organized like a mob, that it gives increasing scope to reason, that, as progress continues, the orator and the prophet come gradually to occupy a subordinate place, that the leadership of the future is the leadership of clear thinking.

In the third essay we have an excellent summary and an unusually acute criticism of the generalizations and laws which have already been formulated by sociological writers of the first rank. An exact inventory convinces the author that sociology is a fundamental and comprehensive discipline uniting at the base all the social sciences. One is inclined to think that more can be said for the genetic interpretation of sociology than Professor Ross is willing to concede. Even where different environments tinge the social evolution of different peoples "with something local and distinctive," the great subjective factors clearly show through in an orderly succession of higher and higher forms.

I am inclined to think that the chapter on recent tendencies in sociology is the strongest in the book. It reveals a fine sanity and fairness and philosophic insight. It is a strong and sympathetic analysis of the views of the great sociologists of the last decade or two. It is perhaps the best brief critical essay that we have upon their work. If the implications of this chapter could be written into other portions of the book, it would be, I think, an advantage.

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There are some of us who dissent strongly from a classification of the natural and cultural desires as social forces. As grouped by both Professor Ward and Professor Ross, they are for the most part only individualistic forces. There exist in society large numbers of persons with an appetite for food, sexual desire to reproduce, parental feeling, who are emotional, intellectual and have a limited sense of duty, but who are nevertheless absolutely non-social beings in any true sense. Egoistic, self-centered, with a hand against every other man—no matter how they might increase upon the earth, they could not build a true society with all eternity to work in. These natural and cultural desires are forces which perpetuate life and intelligence, but they are not even *socializing* forces until they are shot through with the consciousness of likeness, of the possibility of agreement, of friendliness, of common interest.

Some of us think, too, that it is better scientific usage to distinguish between socializing and social forces rather than between original and derivative social forces as in Professor Ross's classification. Those forces of individual desire and feeling and thought which are before society or outside of it, which work upon society, which tend to create a social nature in the individual and are all the time working toward social results—these are true socializing forces. On the other hands the real social forces are those which originate in society, which are direct products of the social mass organization. They usually have a socializing tendency but not necessarily. They may work towards the disruption of society. An example of such a disintegrating social force may be found in the action of the mob in the days of the Paris Commune.

It is particularly interesting to observe the broad outlook which Professor Ross has upon divergent schools of sociology. The antagonism usually reduces itself in his pages to a difference in emphasis upon important phases of the whole subject. The *Rassenkampf* and the *Klassenkampf* theorists live in the countries where the infra-social struggle is still extraordinarily keen. Spencer and Tarde and Giddings live in a society approaching harmony. Speaking of schools of thought, it is, I think, becoming clear that scientific sociology will escape the danger, to which it has been subject, of splitting into two warring branches like the theological Calvinists and Arminians of old. Substitute the sovereignty of the cosmic process for the sovereignty of God and the influence of the reason of man for the dogma of the freedom of the will, and sociology has the same philosophic dualism to face which has so mightily troubled the waters of theology. And the two

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propositions are as irreconcilable in the one sphere as they are in the other. But we must at least attempt to broaden social theory until it includes them both. We can not be content to study only those matters which have human volition as their proximate cause. We must also regard that deeper philosophy which attempts to correlate the social with the cosmic process.

Professor Ross's desire to harmonize the collision of groups and the resemblance schools is a worthy one. But perhaps somewhat stronger emphasis might have been laid upon the truth that the transition from conflict to coöperation can never be accounted for except by the original social nature of man. That is the vital fact in the whole process. We must take account of the perception of difference as well as of the perception of resemblance in the human mind. We must explain the clashing of groups as well as their merging. But the fundamental thing is not the collision of groups, but the blending of groups, and the key to this process is to be found in the study of the social intimations of the individual consciousness. The important thing to know is that the perception of resemblance conquers the perception of difference, that the consciousness of kind, broadly defined, is the essential social quality which conquers antipathy. This proposition of Professor Giddings deserves to stand side by side with the similar proposition of Henry Drummond and John Fiske in scientific ethics, that the struggle for the life of others steadily modifies and conquers the egoistic struggle for life.

Like Professor Ross's previous studies of the influence of social control upon human society, his work of analysis and criticism of the foundations of sociology deserves universal recognition as a contribution of the first order to both sociological literature and sociological science.

FREDERICK MORGAN DAVENPORT.

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Jugendfürsorge und Strafrecht in den Vereinigten Staaten von Nord-Amerika. Von J. M. BAERNREITHER. Leipzig, Duncker und Humblot, 1905.—lxviii, 304 pp.

A trip to the United States, after extensive studies in his own country, has led the author to give to the German reading world a very interesting book on the care of juvenile offenders and criminal law in the United States. Although this subject has not yet been treated *in extenso*, one might find in German publications numerous short articles

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dealing with these questions, which, now nearly settled in America, are still far from solution in Europe.

The greatest advance which has been made in this field has grown out of the recognition of the fact that dependent, neglected, defective and criminal juveniles represent a single social phenomenon in different phases of development. As there is a necessary connection between neglect of children and juvenile criminality, the evils of neglect and of delinquency should be attacked by the same methods. The moral, physical and economic education of the children of to-day will decide the fate of the generation of to-morrow.

In England and France the interest of the child is the decisive factor. The English judge has a great deal of discretionary power, and penal imprisonment for juvenile offenders, formerly the rule, is now the exception. In Germany compulsory education exists for neglected children, but the delinquents still have to feel the full force of an antiquated law, wherein the retaliatory idea of punishment is still prevalent. Liszt and his school are waging war upon this conception, but as yet the results are hardly noticeable. The tendency in those states of the Union which have dealt with these questions is to enforce compulsory education for all the children brought into court, but it is generally left to the discretion of the judge what he will do in each case.

In spite of the diversities in American society it is not difficult to find in criminal and civil law and in the various charitable institutions a certain harmony of thought and practice. The most prominent feature in recent legislation upon the subject is the differentiation of institutions for the care of children with a view to segregation of dependent and neglected children from the delinquent. Both classes, it is recognized, must receive appropriate education. Public and private institutions coöperate harmoniously, and everywhere there is a tendency to free the public institutions from the influence of party politics. It is difficult to overestimate the importance of the part played by private associations in the work of reforming institutions for juveniles. They were largely instrumental in working out the different schemes of separating children from adults in the penitentiaries and in some cases even founded special institutions where the educational idea prevailed over the retaliatory. The aim now is to prepare the children for self-support.

The whole reformatory system in the United States is still in a state of constant change. The merit system in reformatory and penal institutions, the indeterminate sentence, release on parole, the wide discretionary power of the judge as to what measures are to be taken in each individual case are features that quite astonish the author.

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By an indeterminate sentence society is liberated from a criminal until the authority in whose custody he is placed is convinced that he is no longer an enemy of society. Its aim is to bring the offender back to general usefulness. The general practice is to bring juvenile offenders before the judge who introduces them to the probation officer to whose care they are assigned. The work of the probation officer is not confined to the juvenile offender alone. The officer must become acquainted with the child's parents and win their confidence in order to secure their coöperation in the discharge of his duty. Occasionally he has to find work for his wards and he must see that they live in decent places. To keep in contact with the children he generally makes them report every other week and sees them at least once a month in their homes, in school or at their place of work. In Massachusetts the probation system exists even for adults. The duration of the probation period varies; a permanent discharge may be granted for good behavior. Before granting a release it is always necessary to know about home conditions and influences.

Chicago was the first city in the United States to establish, in 1899, a juvenile court. This was done by an act to regulate the treatment of dependent, neglected and delinquent children. As this law was the first one, and all the others are based on it, a short analysis of the most important points may be of interest.

The law as first enacted was applicable to children under sixteen years; by later amendments it was made applicable to boys up to seventeen and girls under eighteen. A dependent petition is made out for a child who habitually begs or receives alms; who has no permanent place of abode; who frequents vicious company and wanders through the streets and alleys; who has no proper parental care or guardianship; who is destitute, abandoned and homeless; who lives in a house of ill repute or in a home which is an unfit place for the care of a child. Children are classed as delinquents when they are incorrigible, knowingly associate with persons of vicious character or frequent houses of ill fame, grow up in idleness and crime, absent themselves from home, habitually wander about the streets or railroad tracks at night without legitimate business, use indecent language or are guilty of criminal conduct.

The court is presided over by one of the circuit court judges in special chambers. A petition may be filed by any reputable person residing in Cook county. Probation officers have to give all necessary information to the court. At present most of the officers are under the civil service and are paid by the county; formerly a juvenile court com-

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mittee paid their salaries. Some workers in charitable institutions and a number of visiting nurses have like commissions. At the police stations sixteen officers in plain clothes take care of the juvenile offenders.

From 2943 cases in 1903 the number increased to 7179 in 1904–5. Similar courts have been established in several other states, the best known being the court in Denver, which has gained a high reputation for efficiency.

A great influence upon all child-saving institutions in the United States is exercised by the National Conference of Charities and Corrections. Its influence tends towards centralization and greater efficiency of personnel.

In connection with an extensive review of Henry M. Boies's *Science of Penology* and C. R. Henderson's excellent *Introduction to the Study of Dependent, Defective and Delinquent Classes*, the author points out the close connection between science and everyday exigencies in American social policy. Theory and practice go hand in hand. In the author's opinion the results obtained must nevertheless be accepted with great reserve.

A chapter on the foundation of family law with special regard to the position of the child closes the book. The American child has an inalienable right to happiness and proper nurture. Parental power is abrogated for the child's benefit.

The whole book is very thorough, and is a much needed presentation of the progress accomplished in the care of children in the United States. Germany will, I trust, soon follow in some way along the same lines.

A valuable appendix is given consisting of a large collection of laws, decisions and opinions on the subject, mostly in English.

VICTOR VON BOROSINI.

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Nordamerikanische Eisenbahnen: Ihre Verwaltung und Wirtschaftsgebarung. By W. HOFF and F. SCHWABACH. Berlin, Julius Springer, 1906.—xii, 377 pp., with map.

This is a report by two members of the Prussian railway administration of an investigation into the organization and working of American railways made at the request of the Prussian Ministry of Public Works. The authors made an extensive journey through the United States and have published a general survey of American railway conditions, to be followed soon by more exhaustive studies of individual railway systems.

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We have had many accounts of this character by foreign travelers, but none that approaches this in thoroughness of detail and in comprehension of the practical problems of railway operation. Not without reason have railway officials been charged with a lack of appreciation of the railway problem from the public standpoint. Quite as fairly, however, may it be asserted that the American public fails to understand the administrative problems of the railway manager and their bearing upon the widely-discussed questions of rates and services. That a comprehension of these practical problems by the public would be helpful toward a sane solution of problems of public control is obvious. All the more surprising is it, therefore, that no work of any value has appeared in this country which treats adequately of the railway as an industry and that the first serious attempt of this kind should be made by foreign observers.

The book is essentially descriptive and comparative. Following the introductory chapters, which describe the route taken by the authors and contain general observations upon American transportation conditions, there are chapters upon the organization and management of railways, officials and employees, relief and pension systems, passenger and freight traffic, the Pullman, express, post and telegraph services, financial operations and problems, and a brief treatment of public control.

As the work is written for German readers, the comparative point of view is kept constantly in mind, and while one may disagree at times with the conclusions of the authors, one is compelled to recognize an honest endeavor all the way through to study the situation without preconceived opinions and to reach conclusions from an examination of the facts. It is hardly surprising, nor is it to be regarded as a serious fault, that the authors, educated in an environment of state ownership and management, and themselves a part of the railway administration, should attribute to their situation a freedom from certain ills to which our public is subjected; yet the fact that they draw no sweeping conclusions, but recognize the advantages and defects of the systems of both countries, is an evidence of their fair-mindedness. They recognize, for example, what the United States has accomplished in the increase of the train-load and the reduction of operating expense; but while conceding the possibility of some increase in the size of their cars, they, like the English railway managers, feel that conditions of traffic are so different in Prussia as to preclude an adoption of the American practice in its entirety. In fact they have evidence to show that in many instances the Americans themselves feel that they have carried their

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practice too far, and that much of the irregularity of their service and many of their serious accidents are to be attributed to the craze for the huge train-load. They comment enviously upon the uniformity of equipment of American railways in general, and show how the insistence of each German railway administration upon individuality in this respect has interfered seriously with the development of through traffic.

In the matter of rates, the authors attempt to reduce the varying conditions of Prussia and the United States to a common basis, by taking into account passenger, freight and express traffic and the compensation for carrying the mails, and after a somewhat involved series of approximations and assumptions, reach the conclusion that not only are passenger rates lower in Prussia than in the United States, which is generally conceded, but that freight rates are also lower except in the case of through rates for the long haul. Although the value of the statistical result is doubtful, the computation is not without significance in revealing clearly the diverse conditions of the two countries and the difficulties of exact comparison. Of more value are the tables of comparative rates for different products which would tend to show that Prussian industries are as favorably treated by the railways as American industries in respect to their raw materials. In fact, a reading of this book leads one to ask whether, in our glorification of the low rate for the long haul, we have not carried our admiration to the point of fetishism and have not come to feel that there is some inherent advantage and even virtue in hauling goods a long distance. This would be a fair inference from some of our recent controversial literature. That the tendency is for rates to fall in Prussia is doubtless correct, but the statement that the opposite tendency is present in the United States is based on observations extending over too short a time to warrant its acceptance. The present movement is perhaps merely temporary.

As is usual in the writings of foreign visitors, our indifference to the safety of passengers and employees as shown in the primitive condition of our safety appliances is criticised, yet not more severely than by our own railway journals. We progress slowly in the expenditure of capital upon construction that does not reward us promptly by an increase in net income.

The authors reach the conclusion that in spite of certain deficiencies, the Prussian system is well adapted to its needs, and that Prussia has not perhaps more to learn from the United States than has the United States from Prussia.

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Industrial Efficiency. A Comparative Study of Industrial Life in England, Germany and America. By ARTHUR SHADWELL. London, Longmans, Green & Co., 1906.—Two volumes: xiii, 346; x, 488 pp.

These volumes are the record of a close study of a number of industrial centres illustrative of the two great branches of competing industries, textiles and metals. In Great Britain, Lancashire and the West Riding of Yorkshire are naturally selected for cotton and wool, but the choice of the Midland district round Wolverhampton as typical of the iron trade involves a considerable amount of unfairness. Dr. Shadwell explains that he did not choose the Clyde district or the north east coast of England because they are not only industrial but great port districts, producing a combination not to be paralleled in the other countries. But it is precisely in those two localities that the British iron industry exhibits its greatest vigor, whereas the Midlands suffer from difficulties of communication and the great firms are gradually moving to the sea-coast. The Rhineland, Westphalia and Saxony are the districts chosen in Germany; Massachusetts, Rhode Island, Pennsylvania and South Carolina in the United States.

The first volume opens with a chapter of "general comparisons." Admitting the difficulties and imperfections of generalizations and seeking to do no more than record his own impressions, Dr. Shadwell has, nevertheless, as was to be expected from so careful and clear-sighted an observer, come to some conclusions of much interest. What struck him most in America was the "frank, direct and straightforward intercourse between man and man," which he contrasts favorably with German formality and the suspicious and secretive habit of mind which he found prevalent in English industrial circles. Mutual distrust is a source of friction and a sign of weakness, but while in the author's opinion it is diminishing in England as between employers and workmen, it is increasing in America with regard to trade unionism and in Germany with regard to social democracy. On this point he agrees with many other observers who hold that an era of grave industrial conflicts is opening both in Germany and in the United States. Directness of character with the consciousness of strength which is behind it is the "fine flower of democracy," and implies a national force which, he thinks, will save the Republic despite the greed, the scramble for money and the local corruption which are sapping the public confidence. The hustling American he considers "rather a new thing," and he finds the old national addiction to "whittling" still latent in the predilection

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for trouble-saving, time-wasting appliances—such as the check system for baggage. The stimulating climate of the States excites cerebral activity in certain directions such as oratory with its correlative of dislike of physical exertion, resulting in the abundant invention of labor-saving machinery. The weak side of these qualities is a tendency to slovenliness.

It is surely remarkable that so little first-class work of any kind is produced in the United States, with all its wealth, population, intelligence and intellectual keenness. . . . The same national failing is conspicuous in the factory and workshop. You see machinery racketing itself to pieces and spoiling the material in the attempt to run faster than it can; you see waste of fuel and steam, machinery clogged and spoiling for want of care and cleanliness, the place in a mess and the stuff turned out in a rough, badly-finished state. When you see this over and over again, you begin to understand why the United States, with all its natural advantages, requires a prohibitive duty on foreign manufactures which it ought to produce better itself. . . .

The Germans are slow, deliberate, careful, methodical and thorough. Some people use the word "plodding," which carries a touch of disdain; but Germany can afford to smile at it. . . . Industrially the Germans excel on the scientific side; they are not an inventive or adventurous people; they are not quick or ready in emergency; they are no pioneers in the wilderness; they require time for thought and action.

The result is an admirable industrial organization, a complete coöperation of government and individual in promoting national interests. To put it briefly the Briton in his characteristics stands midway between the German and the American. It will thus be seen that Dr. Shadwell is essentially a challenging writer, and the thin-skinned person, whatever his nationality, had better leave these volumes alone. This first chapter requires very careful study, for while it is the result of observed facts, yet the general personal views once formed have necessarily colored the narration of these facts and still more the deductions drawn from them.

The bulk of the first volume is occupied with the description of the localities visited and not only their industrial efficiency is taken into account but also what one might perhaps call their vital efficiency. There are whole pages which call aloud for quotation. The British workman who holds it a point of honor to look dirty and ruffianly on weekdays and yet is clean and tidy on Sundays and holidays; the Lancashire housewife who likes to roam the markets on a Saturday night and "look and pick"; the poisoned river Wupper at Elberfeld,

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"the most damnably ill-used running water in the world"; the Carnegie country round Pittsburg—"if Pittsburg is hell with the lid off Homestead is hell with the hatches on"—these and many other pictures rise up before one's mind as one thinks back on the book. The second volume is taken up with the detailed analysis of industrial conditions under the heads of "Factory Laws;" "Factory Conditions;" "Hours, Wages, Workmen's Compensation and Insurance;" "Benevolent Institutions, Housing, Cost of Living and Physical Conditions;" "Social Conditions," "Trade Unions and Industrial Disputes;" "Pauperism and Thrift;" "Elementary Education" and "Technical Education." Throughout these chapters are full of acute criticism and while it is a personal view which is put forward it is a view based not only on reading and travel but on countless interviews with all sorts and conditions of men. The personal view of the hurried or ignorant traveler ought to be negligible, though unfortunately such views added together make up a great mass of public opinion. The verdict of a trained aud unprejudiced observer is quite another matter, and it is because Dr. Shadwell is such a person that the present writer would earnestly commend his chapters even although in many cases he does not agree with the opinions put forward. Dr. Shadwell's view is always his own view, he never follows the crowd, and very often he dissents from accepted views. For example he does not agree with the Mosely commission in thinking that the position of working men is better in the States than in England, nor does he accept the high opinion generally held in England as to the efficiency of American elementary education.

His conclusion is that in many lines England, once so supreme, has been equalled and in some surpassed by her industrial rivals. This he sets down to her great prosperity which has induced a slackness both among manufacturers and workmen, a love of ease, devotion to sport, gambling and theatregoing. Of late the stress of competition has forced a reconsideration of the national position with the effect of producing a great awakening. While doubting the possibility of maintaining a free-trade system he is opposed to the introduction of protection at present, lest by reducing the force of competition it should favor adhesion to old methods. German industrial competition he regards as more dangerous to Great Britain than American. The great danger of the future is the declining national vitality, the decline in the birth-rate, a fatal legacy from the Gospel of Ease, which appears in both Great Britain and the United States. To this problem he promises to return, and for that new book all thoughtful men will look with interest.

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Corporations : A Study of the Origin and Development of Great Business Combinations and of Their Relation to the Authority of the State. By JOHN P. DAVIS. New York, G. P. Putnam's Sons, 1905.—Two volumes : ix, 318 pp. ; 295 pp.

Special interest attaches to the volumes under review because of the relation they were intended to bear to a larger work, the completion of which was prevented by the author's untimely death. These volumes were to serve as an historical introduction to a comprehensive treatise on the modern corporation question. Started as a single chapter of the larger work, they grew to their present proportions and were prepared for separate publication before ill-health interrupted the author's labors. They thus have the finish and unity of an independent work, but lack that vital relation to present-day problems that they would have gained had the author lived to complete his undertaking.

The work is divided into fifteen chapters, of which two treat of the importance and nature of corporations ; six describe the principal types of corporate organization in mediæval Europe, *i. e.* ecclesiastical corporations, municipalities, gilds and educational and eleemosynary corporations ; five deal with the corporations that were prominent in England from the sixteenth to the nineteenth century, *i. e.* regulated companies, regulated exclusive companies, joint-stock companies and colonial companies ; and two conclude with discussions of the "Legal View of Corporations" and "Modern Corporations."

The historical chapters are valuable, not so much because they add to our knowledge of the institutions discussed as because they present a comparative view of forms of corporate organization that are not usually thought of together. Thus economists will find little that is unfamiliar in the chapters on the gilds and the regulated companies, but they cannot fail to gain a clearer notion of the importance of these corporations by comparing them with others of the same periods of which, as economic historians, they have perhaps known little. In the same way the student of politics will gain fresh insight into the municipalities of the Middle Ages and the English colonial companies of later times by having their peculiarities compared with those of contemporary economic corporations. As this was the end which the author had chiefly in view he may be excused for making it his task "to correlate and systematize the existing body of facts, taken for the most part from secondary sources, rather than to discover new facts," and for yielding but rarely "to the temptation to indulge in research" —much as the latter is needed in some parts of this field. He appears

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to have used the sources with discrimination and his own comments on mooted questions are nearly always helpful.

The bearing which these facts in reference to the corporations of the past have on our present-day corporation problem is indicated somewhat vaguely in the last chapter. The historic corporations described were created to accomplish purposes which for one reason or another the state did not feel able to accomplish directly for itself. "The great fact" made clear by their history "is that the state has wholly or partially absorbed their powers." Thus they served as the advance agents of expanding government to be recalled and absorbed by the government as soon as it felt itself strong enough to undertake what it had temporarily delegated to them. The situation which confronts the United States at the beginning of the twentieth century as regards corporations, the author explains as the joint result of the industrial changes which have made associated activity synonymous with business efficiency and that distrust of state enterprise which Adam Smith helped to impress on nineteenth century thought. Associated activity, prevented by the typical American's distrust of government from taking the form of state action, has inevitably assumed the corporate form to an extent never before approached in the world's history. Corporations have grown and multiplied until they overshadow the state itself and already a conflict has begun between the parent state and the corporations, her unruly offspring. "The result can hardly fail to be the same [as in the case of earlier corporations]—an eventual disintegration of corporations, an absorption of their political elements by the state and the relegation of the remaining elements to the individual." Thus by a purely historical argument the author appears to be brought to a conclusion that many others have reached by diverse paths, that is that we are on the threshold of an era which will witness a great extension of the functions of government, on the one hand, and such a perfection of the governmental machinery for protecting the liberty of the individual, on the other, as will greatly lessen the advantages for business purposes of the corporate form of organization.

Space will permit no more than a statement of this, the principal thesis of the author. The evidence which is given in these volumes of his ability successfully to defend it must cause all students to echo the opinion expressed by Professor J. Allen Smith in his introductory note, that

> it must be regarded as a distinct loss to the literature of political science that a writer so well equipped to deal with the modern corporation problem

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and so keenly alive to the significance of the present-day tendency toward the corporate form of organization did not live to complete the work which he had planned.

HENRY R. SEAGER.

Zur Politik des deutschen Finanz-, Verkehrs- und Verwaltungswesens. Reden und Aufsätze. Von GUSTAV COHN. Stuttgart, Ferdinand Enke, 1905. 482 pp.

The three-fold division indicated by the title of Professor Cohn's recently published volume of addresses and essays hardly does justice to the breadth of the discussions contained therein. It is presumptuous, doubtless, for a reviewer to begin by re-arranging, even in part, the subject matter of the book under consideration, but in the present case an excuse may perhaps be found in the highly general content of the term *Verwaltungswesen*, especially when used by one whose most intimate familiarity is with the paternalistic system of Germany. From an American point of view, then, Professor Cohn's first four essays may be said to deal with questions of public finance—imperial, state and local. His fifth and seventh papers, on the "Future of Street Railways," and on "Reaction in the Transportation System" respectively, belong properly under the second heading of his title. The remaining essays fall into two classes. Of these the first may be said to deal with economic theory—in itself a term as vague as our author's *Verwaltungswesen*—and to include his discussions of "Ethics and Reaction in Economics" (vi) and "Two Centuries of Cameral Science" (x). The remaining division, which may be described as more or less pedagogical in character, is devoted to papers on "Bureaucracy and Political Science: Considerations on the Scientific Preparation for the higher Prussian Official Service" (viii), "Considerations on the [proposed] Union of Academic Chairs of Political Science with the Juristic Faculties" (ix), and on "The Freedom of Political Science" (xi).

Although he finds much to criticize, much to suggest from the experience of foreign nations, Professor Cohn's attitude on German imperial and Prussian finances is in general optimistic. With regard to *Militarismus* particularly he may be described as a "stalwart." Technical progress increases the burden of armament, he admits, but at the same time it increases economic efficiency and national wealth. Military expenditures, even at the cost of rapidly growing national debts, are not to be condemned as unproductive and contrasted on this ground with sums laid out by the state for the purchase of profitable undertakings, as *e. g.* railroads.

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> For only armed peace can assure the safety and growth of a nation's economic life, and these ends are to be obtained at no cheaper price [than the cost of armament]. . . . The state possesses not only a material capital, the debt incurred for which is repaid by its productivity; but also an immaterial capital in the security, the peace of the empire, which is bought at the cost of debts incurred for the defence of the country [p. 46.]

Our author's comment on disarmament follows the same lines. "For nations bristling with weapons to stand opposed to each other, and at the same time to enter upon an agreement to reduce the extent of their armament is in itself as absurd as a race between riders who enter upon an agreement to limit speed" (p. 32, n.) A pretty illustration, doubtless, but one that will hardly bear inspection. All fair races are subject to definite, and often quite extensive, agreements as regards length, number and character of entries, *etc.* How would Professor John dispose of the handicap arrangements so frequently employed? But turning from the illustration to the real point at issue, what our author fails to see is that there is a greater absurdity at the end of his own argument than that which confronts the advocates of disarmament. The tremendous burdens of militancy and the probable destructiveness of modern warfare between great nations have certainly been pointed out with sufficient detail and statistical backing to demonstrate the absurdity of the unrestricted competition along military lines that our author advocates, or at least seeks to justify. Moreover one looks in vain in Professor John's book for a discussion—which his argument naturally suggests but which he would find it very awkward to undertake—of the rate of increase of military expenditure as compared with the rate of increase of national wealth.

With the above exception, however, one finds comparatively little to criticise in the essays devoted to financial questions. Particularly interesting is Professor John's opinion that the empire, in sharp contrast with Prussia since 1870, has as yet produced no really great financial legislation. The jealousy of the states, the ease of contracting debts, the absence of the two-party system and the general unwillingness to pay taxes are assigned in explanation. Our own federal history, it will be recalled, began in quite the opposite way, but then it was fiscal necessity rather than *Blut und Eisen* that brought about the formation of the American Union. In this connection may be noted a rather surprising error into which Professor John falls with regard to the finances of the United States. Discussing the productivity of indirect, and particularly of customs taxes, he writes: "Year in and year out

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the federal revenues yield surpluses in excess of need, which have proved the traditional embarrassment of the federal secretary of the treasury" (p. 17). As a matter of fact the real embarrassment from this source has been not from continual surpluses but rather from the everlasting see-saw of surplus and deficit.

A very suggestive part of Professor Cohn's essay on "Taxes and Tax Reforms in the Empire and Prussia" (ii) is devoted to a discussion of the important part played in Prussian finances by the large profits obtained from the state railroads. There is a fly in the ointment, however: vigorous demands are constantly being made by many powerful interests for reduced rates. If these demands are granted a deficit of alarming proportions will immediately ensue, and heavier taxes must be imposed, probably on incomes, property and inheritances. To Professor Cohn this prospect is far from pleasing, particularly as he believes that it would result in driving thousands and hundreds of thousands of middle class voters into the ranks of the Social Democracy.

The constant demand for lowered rates is noted as threatening the policy of municipal ownership which Professor Cohn advocates in his essay on "The Future of Street Railways" (v). American readers will find his discussion of this subject chiefly of interest because of the materials it presents regarding transportation conditions in German cities, and particularly Berlin. The writer's argument, based as it is principally upon the rather doctrinaire ground of an "inner necessity" which is bringing about municipalization, is of less significance.

In his essay on "Ethics and Reaction in Economics" (vi), perhaps the most significant in the volume, Professor Cohn takes up Werner Sombart's famous accusation that German "ethical" economists are in reality reactionaries. German poor laws, factory legislation, laws on school attendance and on stock and produce exchanges are discussed in considerable detail as examples of ethical movements favored by economists which were not reactionary in character. The department store tax, however, which was opposed by economists, is cited as truly reactionary. As for the real reactionary forces in German politics, they are cited here and elsewhere by our author without any mincing of words.

Throughout all his earlier essays Professor John finds frequent occasion to praise the efficiency and honesty of the administrative service of his country. Of course the United States is made to do service as the horrible example which brightens all the more the halo of the *heilige Beamtentum*. It is with something of a shock, therefore, that the reader learns in the essay devoted to "Bureaucracy and Political Sci-

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ence" (viii) that in Prussian universities the law courses are "snaps," the examinations "cinches" and the law students altogether no better than they should be. Nor does Professor John allow himself to be comforted by the flippant story to the effect that "der selige Stahl habe sich gerühmt er sei als Student viel fauler gewesen als die Studenten die bei ihm hörten." Sweeping reforms are demanded to correct the abuses complained of, including a proposal for the more thorough study of the political sciences by prospective administrative officials. The essay on "The Freedom of Political Science" (xi) takes for its text the Ross case at Leland Stanford Junior University, and discusses frankly the various selfish interests, principally capitalistic and agrarian, that seek to derive political advantage from the teachings of German universities. Throughout the essays one notes with pleasure the high ideals regarding his profession that have inspired all the work of Professor John.

ROBERT J. BROOKS.

SWARTHMORE COLLEGE.

A Treatise on the Law of Citizenship. By JOHN S. WISE. Northport, the Edward Thompson Company, 1906.—vii, 340 pp.

This book was prepared, Mr. Wise tells us, at the solicitation of the publishers, though in obedience to a long-cherished wish "to see the discussion of the origin, nature and obligations of American citizenship, state and national, reduced to compendious form in one volume." Unlike Mr. Frederick Van Dyne's recent work on citizenship, which was reviewed in the POLITICAL SCIENCE QUARTERLY for June, 1904, the present treatise deals with state as well as federal citizenship, and also discusses the duties, obligations, rights, privileges and immunities of American citizens. In this respect it supplements Mr. Van Dyne's treatise, and in consequence is likely to prove a book of wider popular interest. While Mr. Van Dyne confined himself strictly to the legal aspect of citizenship, and federal citizenship at that, Mr. Wise writes of almost every phase of the subject, and even of such topics as suffrage, due process of law, taxation, treason, patriotism, police power and other matters which have at most only an indirect bearing upon citizenship. Mr. Wise's treatise is based almost entirely on the statutes and the decisions of the courts. He has made no use of treaty stipulations, diplomatic correspondence, rulings of the Department of State or decisions of arbitration commissions, and consequently his work fails to contain a large body of the law of citizenship, the extent and importance of which may be easily gathered from an examination of Mr. Van

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Dyne's book. This is a most serious defect and will prevent Mr. Wise's work from being ranked as one of the authoritative legal treatises. He does not seem to have examined the excellent works of Van Dyne and Howard or the less valuable ones of Morse and Webster, from all of which he could have gained useful information both as to the law of citizenship and methods of treatment.

Mr. Wise's treatment of the general nature of citizenship does not measure up to the standard attained in other parts of his volume. He has nothing to say of the important distinction between the *jus soli*, which may be called the common law of England and the United States on the subject of citizenship, and the *jus sanguinis*, which is, for the most part, the law of continental Europe, and which has been introduced by statute into the jurisprudence of the United States for determining the status of children born abroad to American parents. Of the confusion arising out of the conflicts between the two theories and the rulings of the Department of State on the resulting problems as they have been presented, Mr. Wise has nothing to say. In treating of the fourteenth amendment it would have been well to discuss the meaning of the important phrase, "subject to the jurisdiction thereof," pointing out the excluded classes. The author refers to the decision of the Supreme Court in the Slaughter House cases as being the first interpretation of the meaning of the above-mentioned phrase, but says nothing about Justice Miller's dictum that children born in the United States of parents who are subjects of foreign powers are excluded under this provision from becoming citizens—an interpretation which was subsequently rejected by the court in the Wong Kim Ark case. He might also have pointed out that the definition of citizenship contained in the fourteenth amendment does not cover at least two classes of persons and that consequently it was necessary to supplement the constitutional definition by statute.

Mr. Wise's treatment of citizenship in the dependencies is full and interesting but contains a few omissions and inaccuracies. On page 34 he refers to the Rasmussen case, decided April 10, 1905, as "defining the status of Alaskan citizenship." The point actually decided in that case was that Alaska had, as a result of treaty stipulations and acts of Congress, been "incorporated" into the United States and that consequently the jury clauses of the constitution were applicable thereto. A great deal was said in the opinion concerning what constitutes "organization" and "incorporation" but nothing about citizenship. If this decision may be interpreted as establishing the law of citizenship in Alaska the same might be said as to the Philippines of the decision

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in the case of Dorr and O'Brien rendered in May, 1904, denying the applicability of the jury clauses in those possessions—a case to which Mr. Wise makes no reference. On page 44 he commits the error of saying that "all the civil rights guaranteed by the constitution" have been extended to the Philippines. A careful reading of the act of July 1, 1902, for the temporary government of the Philippines, a measure which reënacted the president's instructions to the Philippine commissioners in April, 1900, will show that the constitutional guarantees relating to trial by jury, indictment by grand jury and several other fundamental matters were intentionally omitted (32 Stat. at Large, p. 691, sec. 5). Finally, Mr. Wise devotes several pages to the subject of Porto Rican citizenship without mentioning the principle involved in the decision of the Supreme Court in the Gonzales case, rendered in May, 1904, which held that Porto Ricans are not aliens to the United States. It would be interesting to have Mr. Wise's opinion as a constitutional lawyer on the question whether a person who is subject to the jurisdiction of the United States and who is not an alien, because he owes allegiance thereto, can be anything else than a citizen.

The author's discussion of the mode of acquisition of citizenship by naturalization reviews many decisions regarding the cases of European applicants for American citizenship, but contains no references to the decisions concerning Mexicans, Japanese, Burmese and Hawaiians or to polygamists and anarchists of whatever race, although the books are full of cases involving the right of these classes of persons to become citizens under our laws. In his discussion of Indian citizenship Mr. Wise seems to assume that the allotment act affords the only avenue by which Indians may become citizens, thus overlooking the act of 1890 (26 Stat. at Large) which extended the naturalization laws to Indians residing in the Indian Territory. Nothing is said of naturalization by special act, by admission of new states or of the attitude of foreign governments toward their subjects who have become naturalized American citizens. The statement on page 269 that an alien may not vote is an error. In at least twelve states at the present time aliens who have declared their intention of becoming citizens are eligible as voters. To the list of privileges allowed aliens (p. 269) should be added the privilege of participating equally with citizens in the benefits of the homestead laws.

Mr. Wise's treatment of the subject of acquisition of citizenship by birth should certainly contain an analysis of the important act of 1855 which regulates the status of children born abroad of American parents as well as the practices of our government with regard to the status of

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children born in the United States of parents who are subjects of states in which the *jus sanguinis* prevails. The important subject of expatriation is disposed of lightly. No attempt is made to state the rules of our government for determining what constitutes expatriation, as those rules have been worked out in the many cases that have come before the Department of State.

Notwithstanding all that has been said above in criticism of Mr. Wise's book as a treatise on the law of citizenship, it is a useful and interesting work. To the idea of state citizenship he makes a distinct contribution and his discussion of civil rights under the fourteenth and fifteenth amendments contains many original and valuable suggestions.

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The Law of Interstate Commerce and its Federal Regulation. By FREDERICK N. JUDSON. Chicago, T. H. Flood & Co., 1905.—xix, 509 pp.

This volume is the natural outgrowth of a tendency to prolific authorship. The "confessed failure of the system" of taxation in the author's state prompted, in 1900, his *Taxation in Missouri*. This was followed, in 1903, by his more elaborate *Power of Taxation*, of which about one-fifth was devoted to topics discussed in the present work. The increasing interest in the problems of federal control of interstate activities has readily justified the fresh treatment of those topics, and has furnished the opportunity for elaborating such material into an entire volume. This volume, as would any new work on such a subject, will arouse some passing interest, although it is doubtful whether there is much to distinguish it essentially from the mass of digest-commentaries. With some well directed effort it might have been made a permanent contribution to the literature of the subject. The field was practically an open one. Only a single volume on the topic had been written, and since that appeared, in 1898, the materials available have naturally multiplied. It seems doubtful, however, whether the author has had ample opportunity to examine and avail himself of all those materials. Occasionally his discussion of a topic seems to add nothing to the facts or theories of a decade ago. To be sure, he quotes the latest words of the chief executive and the last report of the commissioner of corporations, and he cites or quotes the war secretary, to little scholastic purpose, a score of times; but the reviewer's apprehension that the citations, which are an essential index of value,

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do not always bring one down to date is confirmed in some instances by close scrutiny; and if the examination of authorities was conducted in a manner at all approaching that in which the proof was read, one would certainly hesitate to put an unquestioning reliance upon the book.

Disregarding the fifth of the volume which is given up to lists and index, practically one-half of the text is devoted to a reprint of the Interstate Commerce Act, most of the sections of the text being followed by short digests of decisions interspersed with the running comment of the author. The arrangement is not especially useful for the working lawyer. He may, at times, well be in doubt as to how much is decision, how much dictum, and how much editorial opinion; nor is there anything to indicate whether a particular brief statement is the only, or the controlling, point of a case. The form of this section will not appeal to lawyers; and to general readers it will seem like an aimless ramble. There appears to be little subordination of material to the author; organization of material and its interpretation seem of less importance than getting everything into the book. For instance, section 208 is merely a series of citations, with short statements, to illustrate "undue preference in classification." It is thus tersely pointed out that "Hostetter's stomach bitters were held not properly classified in the first class with other liquids similar in character," that "toilet soap was held properly classed higher than laundry soap," that "celery was properly classified with vegetables rather than with fruits," that "cow-peas were held properly classed with grain, and not with fertilizers," while in one case cited it is said merely that "the principles of classification were discussed and applied in the case of surgical chairs." Such a solid string of citations as that on page 178 hardly benefits the body of a treatise. Occasionally, sentences seem to be constructed rather unconventionally, as on page 217; while in one instance the author's haste has driven him to commend, by incorporation, some well chosen words originally produced by Commissioner Prouty. If this portion of the work could be properly edited—if the original work were separated from the compiled portion and the purely illustrative material and citations put into foot-notes that would not break the continuity of any real discussion—the appearance of the pages might be considerably altered, but the value of the book could be much enhanced. The same suggestion, in a less degree, would apply to the distinctly original portion of the volume, consisting of some one hundred and forty pages. This essay, which precedes the annotation of the statute, discusses in a fairly readable way the general topics presented, such as the concurrent and exclusive powers under the constitution, the federal

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regulation of interstate commerce and the federal control of state regulation. The same general field had already been thoroughly covered by Prentice and Egan in their *Commerce Clause*, and it is doubtful if the later work will in any degree supersede the older.

While the author is quite punctilious in indicating the sources of his information and theories, it is somewhat noteworthy that at no point is any reference made to the existence of the earlier work. This would not be matter of comment but for the fact that the present work certainly owes something to an introduction to the materials furnished by its predecessor. It may readily be granted that this obligation may be no more than one editor should feel to an earlier worker by whom he has, perhaps unconsciously to himself, been somewhat guided or assisted; yet, in the absence of any acknowledgment of such obligation, one cannot help noticing the close similarity between the two books: for instance, in their mention of Gibbons *v.* Ogden (Prentice, p. 15; Judson, p. 9) and of Willson *v.* Blackbird Creek Marsh Co. (Prentice, p. 21; Judson, p. 32); in their characterization of "the original package" rule (Prentice, p. 70; Judson, p. 26); and in the choice by the later writer of the year 1840 (Judson, p. 4, note 1; Prentice, p. 14).

Mr. Judson's statement (p. 24) that the original package rule was "first declared" in Brown *v.* Maryland would hardly have been allowed to stand unchanged if the writer had examined Freund's *Police Power*, sec. 81. For the third proposition in the second paragraph on page 48 the author cites only four cases, all of which were cited in the earlier work. He apparently ignores the later decisions, as he may be entitled to do; but certainly some allusion should have been made to the unique decision of Jannin *v.* The State, 42 Texas Crim. Rep., 631. These comments should not, however, detract from the fact that the volume contains much which is interesting, and also much, such as the tables of decisions of the Interstate Commerce Commission, which is the result of well directed industry.

The volume contains a reprint of several pertinent statutes, all readily available for both lawyer and student. It includes the rules of procedure of the Commission, also easily available; and there are furnished a few useful forms, but with no mention of the fact that they are merely reprinted from the Tenth Annual Report of the Commission.

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BOOK NOTES

Among the interesting institutions recently inaugurated in Belgium under the name *Instituts Solvay* the Institute of Sociology, presided over by M. Emile Maxweiler takes a prominent place. The literary output of this institute comprises three classes of productions—(1) *Notes and Memoirs*, being occasional sociological studies of an original character, as well as scientific criticisms; (2) *Social Studies* dealing with the social sciences in general; and (3) the so-called *Actualités Sociales* or small volumes designed to popularize the subject. Of this last series nine numbers, varying in size from 90 to 300 pages have appeared in 1904 and 1905. The series is inaugurated by a study entitled *Principes d'orientation sociale* by M. Solvay, the founder of the Institute, and among the other interesting studies are those on the "Productivity of the Human Machine;" "Fatigue from a Military Point of View;" "Insurance and Poor relief from a Medical Point of View;" "Corporate Abuses" and "Tenement-House Labor." The studies are not confined to Belgium, as in the case of the "Belgian Coal Industry" but treat of other countries, as the "Protection Movement in England," and "the Struggle against Degeneration in Great Britain."

M. Jean Jaurès's *Studies in Socialism* (London, the Independent Labor Party, 1906) is a conspicuously able defense of that wing of the Socialist party which seeks through gradual reforms, rather than through revolution, to compass the reorganization of industrial society. One of the greatest merits of this book is its freedom from the intolerant spirit which even the greatest socialistic writers display toward fellow Socialists who disagree with them upon matters of practical policy. Under the leadership of men like Jaurès the Socialist party would quickly cease to be an object of dread even for those who most abhor its principles. M. Jaurès insists vigorously upon the necessity of winning over to socialism the vast majority of the citizens of the state before any endeavor should be made to introduce the socialistic scheme in its entirety. Even a respectable minority devoted to existing institutions would, in his opinion, prove an insuperable obstacle in the way of a socialistic state. This view he fortifies with arguments drawn from history and from common sense which it would be extremely difficult for the revolutionary socialist to refute.

In the fifth edition of Professor Werner Sombart's *Sozialismus und*

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soziale Bewegung (Fischer, Jena) the facts have been brought down to the beginning of 1906 and the whole work has been remodeled. So scrupulously fair has the author been that he is often mistaken for a Socialist, whereas a careful scrutiny of the book would disclose the fact that the contrary is the case. In its new form the work has all the charm of the old one, which has been translated into all the important modern languages, and which has in Germany reached a sale of over 30,000 copies.

In a little volume entitled *Christian Socialism in England* (London, Swan Sonnenschein & Co., 1903; viii, 208 pp.) Dr. Arthur V. Woodworth gives a scholarly though not very entertaining account of the history of the Christian Socialist movement. The main emphasis of the book is placed upon the religious and ethical aspects of the movement; the discussion of the social aspect is somewhat hazy, as was perhaps inevitable, since the Christian Socialists themselves appear to have had no very clear ideas as to the social order which they hoped would in time replace the competitive society in which they lived.

One of the most picturesque figures in the early anarchist movement in the United States was Josiah Warren. An interesting light is thrown on his struggles by William Bailie in the little biography entitled *Josiah Warren, the First American Anarchist. A Sociological Study.* (Boston: Small, Maynard & Co.) The book does not purport to be a scientific analysis of his doctrines, for which the author is evidently unqualified. It is worthy of note to find the statement that "Warren's theories of value and the reward of labor were not put forth as an explanation of existing economic phenomena, but rather as the principles which, in a perfectly free state of society, would govern economic relations." The author of *Cost, the Limit of Price*, must hence be regarded as an amiable utopist.

One of the latest volumes in the Selections and Documents in Economics edited by Professor Ripley is *Selected Readings in Public Finance*, by Charles J. Bullock. (Ginn & Co.) The editor of this compilation provides a chapter on the literature of public finance and also furnishes the connecting links between extracts from widely varying sources. The chief criticism to be passed upon what is in other respects a most useful work is the comparatively slight attention paid to specifically American problems. The treatment of the general property tax and of the corporation tax—which form the central points in the American revenue systems—is wholly inadequate, and almost no attention is paid to recent developments. In a future edition it would be wise to supplement the Massachusetts Report by those of some of

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the other states, and of organizations like the New York Tax Reform Association.

Bunshiro-Hattori, sometime Fellow in Social Science at Princeton University has published a study on *Local Finance in Japan in Relation to Imperial Finance*. The monograph, which covers a field that is rather new to occidental students, is only a sketch, based on rather scanty material, and is of interest chiefly as illustrating the general system. The English is rather better than is usually found in Japanese doctoral dissertations, but is still far from smooth; and there are entirely too many misprints, as "compromises" for "comprises" (p. 4), "Row-Fugo" several times for "Row-Fogo" (p. 61), and repetitions of entire lines as on p. 24 and elsewhere.

Mr. Percy Kinnaird's *The Legal Tender Problem* (Chicago, Ainsworth & Co., 1904; 338 pp.) is the highly imaginative and unreliable product of a Nashville lawyer. Aside from his general disregard for facts, what seems most characteristic of the author is his animosity toward New England and "the East" generally and his apparent belief that all human greed and cunning find their embodiment in the Republican party. His central thesis is that government issue of full legal tender paper is a panacea for most national ills and that failure to adopt such a money system is a sufficient explanation of the decay of states.

The merit of the little volume published anonymously under the title, *A Corner in Gold and Our Money Laws* (London, P. S. King & Son, 1904), lies in its plea for greater elasticity in the paper-money system of Great Britain; but the exposition constantly betrays superficial acquaintance with the general theory of money. Nearly half of the volume (pp. 113–200) is an appendix giving in full two speeches of Sir Robert Peel (May 6 and May 20, 1844) on the subjects of the renewal of the bank charter and the state of the law respecting currency and banking.

H. Stanley Jevons's *Essays on Economics* (London, Macmillan & Co., 1905; xi, 280 pp.) is in form an elementary text-book in economic theory. As such it covers only a limited portion of the field. Aside from the introduction, the book contains only six chapters: "Pleasure and Pain;" "Utility;" "Labor;" "Exchange and Capital;" "Rent" and "Production." In his general view of economic method Mr. Jevons follows closely the ideas of his father, the late W. Stanley Jevons; hence no one need be surprised that the pseudo-psychology of the hedonic school is again put forward as a satisfactory basis for economic reasoning. "That ambiguous and dangerous term, value," is

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avoided altogether; and "cost" is limited to the meaning of money cost. However little one may be disposed to accept many of the author's views, one must recognize in this little book a quality of vigorous thought and of definite expression which is unfortunately rare in much of current economic writing.

In view of the remarkable increase in the number of economics text books of American origin, it is somewhat surprising that a publisher should find it profitable to place on the market a translation of a foreign text-book, even though the work is one possessing so many admirable qualities as Professor Emile Levasseur's *Elements of Political Economy* (translated by Theodore Marburg: Macmillan, 1905). The translation is excellent, and preserves much of the literary quality of the original. As an introductory work, this book has the merit of extreme lucidity. In spite of additions and changes made by the translator, it is, however, essentially a foreign work. The illustrative material is almost all drawn from French economic life, and the problems discussed are selected with regard to the needs of French students. Thus a considerable space is devoted to the trade guilds of Europe, but none to trusts in America. The treatment of theoretical problems, moreover, is somewhat obsolete. It is therefore doubtful whether the book will prove available for use in American colleges.

Mr. Frank Julian Warne's *Coal Mine Workers* (New York: Longmans, 1905; x, 252 pp.) is a sympathetic account of the organization, methods and aims of the United Mine Workers. Events which have occurred since the publication of Mr. Warne's book corroborate his view that the mine-workers' union is a conservative organization, and that it is fortunate in having a leader of unusual sagacity. The book is written in a scientific spirit, if one excepts a tendency at times to condone violence on the part of the union against non-union men. Since the union is avowedly an open one, making no discriminations on account of race or color, and charging very moderate fees and dues, the author is disposed to join with the unionists in regarding as enemies of mankind those who obstinately refuse to become members.

In number 5 of the Social Science Series of the Colorado College Studies Mr. B. M. Rastall discusses *The Cripple Creek Strike of 1893*. The material has been drawn in large part from actual participants and eye witnesses, and as a consequence the external history of the strike is described with fairness and accuracy. But we miss with unimportant exceptions anything more than this mere chronicle of events.

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A Comparison: The Brassworkers of Berlin and Birmingham (London: P. S. King and Son, 1905) is a monograph of more than local interest. In it three representatives of Birmingham, a manufacturer, a trade unionist and a philanthropist, give a simple report of the impressions made upon them by a study of the formative influences in the lives of Berlin's brassworkers. It is striking testimony to the changed temper of the erstwhile self-confident, not to say self-satisfied, Briton, that at almost every point the comparison made is favorable to Berlin. Quite as suggestive is the explanation of the superior lot in life of the Berlin brassworker that is offered: more sensible social standards and customs, and better provision by the state for trade education, relief in time of sickness or unemployment and care in old age. The point about the benevolent institutions of Berlin that most impresses these visitors is the sharp distinction made between the self-respecting victims of misfortune and the vicious and vagrant. Their conclusion in reference to the much-criticised system of compulsory insurance is altogether favorable and they go so far as to say: "the idea of compulsion in such cases is perhaps repugnant to the traditions of Englishmen, but it is a matter for thoughtful consideration whether this sort of submission [to law] denotes that the German is ahead or behind the Briton in his attitude towards it." The pamphlet is to be commended as a valuable addition to that still all too small body of literature which attempts to go below a mere surface comparison of the money wages paid in different lands to a study of those factors which contribute to permanent well-being.

An excellent example of the kind of useful work that can be done by local authorities under enlightened suggestion and assistance is the neat and well printed *Records of the Town of Hanover, N. H.*, prepared and issued under the supervision of Professors H. D. Foster and S. B. Fay, of Dartmouth, and Mr. G. M. Bridgman, the town clerk. The volume contains the official proceedings of the town meeting of Hanover from the founding of the town in 1761 to 1818. In such quaint records as are here made easily accessible to all students, both history and political science find the best possible material. Here is the town meeting of actuality—a wholesome antidote to the town meeting of fancy which has figured in—and disfigured—the works of some enthusiastic admirers of what they thought ought to have been our early institutions.

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